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No. 85-1728

IN THE

The United States Supreme Court

October 1985 Term

J. PLACIDO GARCIA

V.

BOARD OF EDUCATION OF THE SOCORRO CONSOLIDATED SCHOOL DISTRICT, LEO LUJAN, MARGENE HARRIS, DANIEL TRUJILLO and DAVID SHORTESS, Individually and as Members of the Socorro Consolidated School District.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the defense provided by Eleventh Amendment to the United States Constitution waived by a New Mexico School Board, or is the board estopped from raising such defense, when the board stipulates that it will not raise any immunity defenses should the Plaintiff in a 42 U.S.C. §1983 action agree to dismiss the complaint against members of the board in their individual capacities?

2. Does the Eleventh Amendment to the United States Constitution prohibit an individual from bringing suit against a local New Mexico school board in federal court based upon 42 U.S.C. §1983?

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REPORT OF DECISION

This decision has not been reported.

STATEMENT OF JURISDICTION

On November 22, 1985, the United States Court of Appeals for the Tenth Circuit in cases numbered 82-1174, 82-1185 and 82-1238 reversed a District Court Judgment awarding Petitioner One Hundred Eighty Thousand Dollars. On January 23, 1986, Petitioners' Petition for Rehearing and Suggestion for Rehearing en banc was denied, with the Court being evenly divided on the en banc suggestion. See Orders of January 28, 1986 and April 14, 1986. 28 U.S.C. §1254(1) confers jurisdiction on this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION

Eleventh Amendment

UNITED STATES STATUTES

42 U.S.C. §1983

TREATISE

Tribe, American Constitutional Law, 1978, page 149, et. seq.

NEW MEXICO CONSTITUITIONAL PROVISIONS

Art. V, §13

Art. VIII, §7

NEW MEXICO STATUTES

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STATEMENT OF THE CASE

J. PLACIDO GARCIA was the Superintendent of Schools of the Socorro Consolidated School District for many years. The Board of Education of the Socorro Consolidated School District is the governing body of that district. Defendants LUJAN, HARRIS, TRUJILLO and SHORTES were members of the Board.

The Defendant Board voted not to rehire the Petitioner following the natural termination of his employment contract with the Board. In association with this decision, the Defendants made statements to newspapers and to a public gathering which "stigmatized" Petitioner. Petitioner brought suit under 42 U.S.C. §1983 in the United States District Court for the State of New Mexico, claiming in part that he had been denied a liberty interest without due process as a consequence of the statements made by the Defendants. Among the defenses raised by the Defendants in their initial pleadings, was that the Eleventh Amendment to the United States Constitution barred suit against a local school board in Federal Court. This defense was never again asserted throughout the entire District Court proceedings, and in fact was specifically abandoned.

The case was tried before a jury. Plaintiff sought to recover his damages from the Board and its members in their official capacities and also against the Board members as private individuals. At the close of the evidence, the judge suggested to Petitioner that he simplify matters by dismissing his claim against the Board members in their individual capacities. Petitioner responded that it would follow the Court's recommendation. Whereupon, the Court asked counsel for the Defendants whether any immunity defense would be raised if this dismissal were to occur. Defendants responded, assuring the Court and Petitioner that no such defense would be raised. See Majority Opinion, page 51, Appendix A.

The jury returned a verdict in favor of Petitioner in the amount of One Hundred Eighty Thousand Dollars ($180,000). The Defendants appealed. The Brief in Chief

contained no mention of any Eleventh Amendment immunity. However, shortly before oral argument was to be held, Defendants wrote the Court of Appeals and announced that they now desired to raise the Eleventh Amendment immunity as a defense. The Court of Appeals allowed the Defendants to raise the defense and, in a 2-1 decision, overturned the District Court Judgment and ruled that the Eleventh Amendment bars suit against a local New Mexico school district in Federal Court.

While there was no presentation of facts or law made at the District Court level concerning the applicability of the Eleventh Amendment to local school boards, various constitutional provisions and statutes are involved.

A review of local school board powers reveals extensive local control over the local districts. N.M.S.A. 1978, §22-5-4 provides for:

1. Local control of schools, and property within the the school district.

2. All employment decisions to be made locally, including fixing salaries.

3. The power to contract, lease, purchase and sell for the school district.

4. The ability to sue and be sued.

5. The power to exercise eminent domain.

6. The power to issue bonds for the school district.

7. The power to subpoena witnesses for hearings before the local board.

8. The power to contract for expenditures under the Procurement Code.

9. The power to adopt regulations for the administration of the school district.

10. The power to pay rewards from school district funds.

Other statutes further establish the autonomy of local school districts. See

N.M.S.A. 1978, §22-1-2(J) and §22-1-2(K). The Constitution of New Mexico provides that a school district is a political subdivision of the State. Article V, §13. While the budget process is supervised by the Office of Education of the Department of Finance and Administration under N.M.S.A. 1978, §22-8-4(A), this is only to assure that minimum requirements are met. N.M.S.A. 1978, §22-8-9. Significantly, similar budgetary controls are placed upon municipalities and counties. Yet, under the Monell doctrine, cities and counties do not enjoy the Eleventh Amendment immunity. See N.M.S.A. 1978, §6-6-2.

In contrast, the State Board of Education holds only a general supervisory function over local districts and does not involve itself with the daily operation and management of school district affairs. The State Board is primarily a rule making

body with its function being to (1) set policy, (2) designate courses of instruction, (3) determine teacher qualifications, (4) prescribe minimum graduation requirements and (5) take over school districts in the rare instance where the local governing bodies fail to abide by state law in operating the schools. N.M.S.A. 1978, §22-2-2.

Also involved are statutes relating to the payment of civil rights judgments against local school districts.

The State of New Mexico collects taxes from the general public and thereafter establishes a "public school fund." It is solely from this fund that money is distributed to the local school districts pursuant to a statutory formula. N.M.S.A. 1978, §22-8-14 and §22-8-18 through 25. Some of these funds are used by school districts to participate in the New Mexico Tort Claims Act (N.M.S.A.

1978, §41-4-1, et seq.) through contributions to a "public liability fund", which is solely funded by assessments to local public bodies. N.M.S.A. 1978, §41-4-23 and N.M.S.A. 1978, §41-4-25. If the fund is exhausted in any particular year, it remains exhausted until next year's assessments are collected. N.M.S.A. 1978, §41-4-25(B)(3).

Judge McKay, in the dissenting opinion, points out, moreover, that the New Mexico Tort Claims Act does not appear to authorize the payment of any civil rights judgments obtained in federal court.

> However, the provisions upon which they rely covers only "risk[s] for which immunity has been waived under the provisions of the Tort Claims Act." N.M. stat. Ann. §41-4-20 (a)(1978). The Tort Claims Act appears to waive immunity only for suits brought in district courts in New Mexico. id. §41-4-18(a). Thus, the risk coverage provisions of §41-4-20 through §41-4-27 would not apply to a federal court judgment

> such as would issue in this case. In addition, since the State has not waived sovereign immunity from constitutional claims against public employees such as school board members, the risk coverage provisions would not apply to a judgment in this case, even if they were construed to cover federal court judgments. Contrary to the assumption implicit in the majority's opinion, therefore, a judgment probably would not be paid out of this state fund.

Dissenting opinion, p. 97, Appendix A.

Of most importance is Article VIII, §7 of the New Mexico Constitution. This provides in effect that judgments against school districts shall be "paid out of the proceeds of a tax levy..." in the local school district. The Court of Appeals asserted that this Constitutional provision is not self-executing and that while N.M.S.A. 1978, §7-37-7(c)(3) allows a tax levy for the payment of tort and workmen's compensation judgments, such authorization does not include a tax levy for the payment of a civil rights judgment. It is submitted by

Petitioner that N.M.S.A. 1978, §§7-36-7, 7-37-2, 7-37-6 and 7-37-7(c)(1) provide sufficient statutory execution of this constitutional provision. In any event, Article VIII, §7, New Mexico Constitution prohibits payment of local school board judgments except through special tax levies in local districts.

> No execution shall issue upon judgment rendered against... any... school district or board of education... but the same shall be paid out of the proceeds of a tax levy as other liabilities of counties, incorporated cities, towns or villages, school districts or boards of education, and when so collected shall be paid by the county treasurer to the judgment creditor. Art. VIII, §7, N.M. Const.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Eleventh Amendment Waiver

The essence of this issue is contained in the following communications between the Court, the Defendants' Counsel and Plaintiff's Counsel:

THE COURT: [T]he instructions are

drafted as against the Defendants strictly in their official capacities. I understood that's the way the Plaintiff wanted it. Therefore, that takes out any issue of punitive damages and also any issue of good faith. So if there's no hooker -- There's no problem; if the Plaintiff is entitled to a verdict, its recoverable. I assume that's true.

[Defense Counsel]: That's true, Your Honor.

THE COURT: I mean if the Plaintiff were recovering, then all at once the school district will not respond or claim some kind of immunity or something.

[Defense Counsel]: No. They probably would not have the money, but there's no problem with that.

[Plaintiff's Counsel]: Of course, if there's nothing with the County, the Constitution provides for that.

As stated previously, the Defendants, in the presence of and in response to an express inquiry of the District Judge, stated that they would not raise any Eleventh Amendment immunity issue if the Petitioner dismissed his case against the school board members in their individual capacities and subsequently

recovered a judgment against the board and the board members in their official capacities. Shortly before oral argument on Defendants' appeal from the District Court judgment following the jury verdict, however, the Eleventh Amendment issue was raised. The majority of the Court of Appeals sympathized "with the trial court and the Plaintiff when they [had] been 'sandbagged' as they were on this issue." Opinion p. , Appendix A. However, the majority ruled that the doctrines of waiver and estoppel cannot apply to the Eleventh Amendment defense.

It is submitted that the decision of the Court of Appeals flatly contradicts the holdings in Edelman v. Jordan, 415 U.S. 651(1974); Ford Motor Co. v. Department of Treasury, 323 U.S. 459(1945); Pennhurst State School and Hospital v. Halderman, 465 U.S. 89(1984); Clark v. Barnard, 108 U.S. 436(1883); Patsy v.

Board of Regents of the State of Florida, 457 U.S. 496(1982); Employees v. Missouri Public Health and Welfare Dep't, 411 U.S. 279(1973); Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275(1959); Quern v. Jordon, 440 U.S. 332(1979); and Gaunter v. Atlanta Coastline R. Co., 200 U.S. 273(1906); and in so doing has permitted, and now encouraged, litigants to play "fast and loose" with the judicial system, and has placed in jeopardy every Federal Court judgment ever obtained against a public body which has or will be blessed with Eleventh Amendment protection.

Each of the cases cited acknowledges that the Eleventh Amendment is an immunity which may be waived by the State. The remaining issues discussed in these cases are (a) whether there was in fact a "waiver" of the Eleventh Amendment; and (b) whether the individual who purportedly

waived the Eleventh Amendment had authority to do so.

Clark v. Barnard, supra, held that a state which voluntarily intervened in a federal proceeding waived its right to raise the Eleventh Amendment defense. Edelman v. Jordan, supra, merely decided that a state, by participating in a federal program, did not waive its right to the Eleventh Amendment defense, emphasizing that the waiver must (as here) be express and not implied.

Employees v. Missouri Public Health and Welfare Dep't., supra, cited with approval by Pennhurst, Edelman, Fitzpatrick v. Bitzer, 427 U.S. 448(1976) and Quern v. Jordon, supra, fully discusses the issue of waiver of Eleventh Amendment protection.

> At the same time, it is well established that a State may consent to federal suit and submit to the exercise of federal jurisdiction over it. See, e.g., Petty v. Tennessee-Missouri Bridge Comm'n,

359 U.S. 275, 276, 79 S.Ct. 785, 787, 3 L.Ed. 2nd 804(1959); Gaunter v. Atlantic Coast Line R. Co., 200 U.S. 273, 284, 26 S.Ct. 252, 256, 50 L.Ed. 477(1906); Clark v. Barnard, 108 U.S. 436, 447, 22 S.Ct. 878, 882, 27 L.Ed. 780(1883). At page 295-296.

In footnote 10 at page 295, the Court sets out the development of the concept of waiver of the Eleventh Amendment defense. Instead of attempting to summarize, the comments will be set forth verbatim.

> My Brother BRENNAN argues in his dissent that recognition of a State's power to consent to suit in federal court is inconsistent with any view that the impediment to private federal court suits against a State has constitutional roots in the limited nature of the federal judicial power. He is, of course, correct when he points out that, as a rule, power to hear an action cannot be conferred on a federal court by consent. And, it may be that the recognized power of States to consent to the exercise of federal judicial power over them is anomalous in light of present-day concepts of federal jurisdiction. Yet, if this is the case, it is an anomaly that is well established as a part of our constitutional jurisprudence. For there are decisions by this Court--including at least one joined by my Brother

BRENNAN--clearly holding that constitutional limitations upon the exercise of the federal judicial power over private suits brought against a State may be waived by the State.

Thus, in Clark v. Barnard, 108 U.S. 436, 447, 2 S.Ct. 878, 82, 27 L.Ed. 780(1883), the Court rejected Rhode Island's argument that a claim made against it in federal court by a Connecticut corporation was specifically barred by the Eleventh Amendment in light of the fact that initially the State voluntarily intervened in the action to assert a claim of its own and thereby consented. Similarly, in Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed.2d 804(1959), which involved a tort suit brought in federal court by a resident of Tennessee (see 254 F.2d 857, 862 (CAS 1958) against a bi-state corporation formed by Missouri and Tennessee, the Court treated the suit as one against the States, but rejected their argument that the suit was prohibited by the Eleventh Amendment. The Court found that the States had waived their immunity from federal court suit in the compact by which the bi-state corporation was formed. Given the citizenship of the plaintiff in Petty, by Brother BRENNAN, with his literalist view of the Eleventh Amendment, might say that as to Tennessee there was no issue of constitutional magnitude and that the State had simply waived its common-law immunity. But insofar as Missouri was also held to have consented to federal court suit,

> the Court necessarily dealt with the limits of the federal judicial power since, as to Missouri, the suit was within the literal language of the Eleventh Amendment. See also Missouri v. Fiske, 290 U.S. 18, 54 S.Ct. 18, 78 L.Ed. 145(1933). In short, I cannot accept my Brother BRENNAN's literalist approach to the Eleventh Amendment in light of prior decisions, and certainly his position is not aided by the clearly erroneous suggestion that any constitutional limitation on the exercise of the federal judicial power over private suits against States would constitute an absolute bar to the prosecution of such suits in federal court. (emphasis added)

The only conclusion that can be drawn from these cases is that the Eleventh Amendment, while jurisdictional in nature, is more akin to a venue defense which may also be waived. See, Patsy v. Florida Board of Regents of the State of Florida, supra. Indeed, the primary purpose of the Eleventh Amendment was to preserve the integrity of state law and state institutions and protect them from excessive federal influence. Tribe, American Constitutional Law, 1978, page

149, et seq. If a state consents to the federal arena, how can it later be heard to complain. The only way to harmonize this Court's decisions on the Eleventh Amendment and waiver is to recognize that even if the Eleventh Amendment defense may be raised at any time even on appeal, the defense must fail if the immunity has previously been expressly waived.

Ford Motor Co. v. Department of Treasury, etc., supra, at first appears to be an anomaly. However, upon close examination it is clear that the case was limited to a determination that Indiana statutes specifically restricted the attorney general in his representation of the state, and as a consequence he lacked the power to waive the Eleventh Amendment for Indiana due to this local statutory restriction. Significantly, the court cited with approval Clark v.

Barnard, supra.

Questions which need to be asked in such circumstances are whether the attorney for the local board unequivocally waived the Eleventh Amendment, and whether he had the power to do so. In this case, the local board expressly and unequivocally waived whatever Eleventh Amendment immunity it had, not only by its conduct, but by an express representation to the Court and to Petitioner prior to submission of the case to the jury at trial; the only remaining question is whether the board, through its attorney, had the power to waive the defense.

In McWhorter v. Board of Education of Tatum Independent School District No. 28, Lea County, 63 N.M. 421, 320 P.2d 1025(1958), the court held that a school district is a political subdivision of the state created for state purposes and subject to the same

privileges and immunities in regard to suit as the state.[1] One of the privileges the state has in litigation is to waive the Eleventh Amendment defense. Also, there is no New Mexico statute or Constitutional provision which in any way restricts the board's attorney in his representation of his client, in contrast to the local law that existed in Ford Motor Co.

Further analysis of New Mexico law is also of benefit. New Mexico holds that where "right and justice demands it," a state will be estopped even in the performance of police functions and

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1. As observed in the Dissent, page footnote 1, the state court's characterization of local school boards is usually a legal conclusion which is not binding on federal courts, particularly in light of Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274(1977). McWhorter is helpful, however, in that it emphasizes the power and autonomy of local school boards.

the performance of other governmental functions, such as the collection of taxes. See Ross v. Daniel, 53 N.M. 70, 201 P.2d 993(1949); The United States v. Bureau of Revenue, 87 N.M. 164, 531 P.2d 212(1975), and National Advertising Co. v. State, etc., 91 N.M. 191, 571 P.2d 1194(1977).

There are, accordingly, two grounds for holding that estoppel or waiver should be applied in the instant case. First, a New Mexico school board has by statute and New Mexico case law the inherent power when involved in litigation to waive defenses which the State could otherwise waive, and such waiver clearly occurred. Second, even if the school board did not have the power to waive the Eleventh Amendment, under New Mexico law, where right and justice demand it, estoppel will be applied.

The Tenth Circuit, by holding that the Eleventh Amendment is an absolute jurisdictional bar to suits against a school district in federal court, has not only ignored holdings of this United States Supreme Court, but is encouraging behavior by litigants which is generally not tolerated. See Di Frischia v. New York Cent. R. R. Co., 279 F.2d 141, (3rd. Cir. 1960), where a party was prohibited from challenging the "diversity" jurisdiction of the District Court due to conduct of a variety similar to that displayed by Defendants. In that case, the defendant, after previously stipulating to facts necessary to confer jurisdiction, thereafter sought to establish that the stipulated jurisdictional facts were untrue in an attempt to divest the Court of jurisdiction.

Further, the majority holding would

mean that every judgement ever entered against New Mexico school boards in Federal Court is void, and "waiver" and "estoppel" will not prevent the boards from overturning judgments entered long ago and inflicting economic chaos on those who have adjusted their lives to reflect damage awards received in Federal Courts.

For the above reasons, Petitioner submits that the doctrine of waiver of the Eleventh Amendment is alive, certainly applies in this case, and should be enforced to reverse the Tenth Circuit's ruling in this case and reinstate the District Court's judgment in favor of Petitioner.

ELEVENTH AMENDMENT IMMUNITY AND LOCAL SCHOOL BOARDS

Relying on the recent decisions of Martinez v. Board of Education of the Taos Municipal School District, 748 F.2d 1393 (10th Cir. 1984) and Maestas v. Board of Education of the Mora

Independent School District, 749 F.2d. 591(10th Cir. 1984), the Tenth Circuit has now ruled that the Eleventh Amendment applies to local school districts. This decision is incorrect for two reasons. First, the school districts are clearly autonomous and state funds cannot be used to pay civil rights judgments; and, second, even if there exists a possibility that state funds might be used to pay a civil rights judgment, this factor, by itself, should not cause school districts to be classified as an arm of the state. The logical extension of the Tenth Circuit's ruling would be an emasculation of Monell v. Department of Social Services, 436 U.S. 658(1978), as most counties and municipalities receive some state funding, and Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274(1977), the case upon which the Tenth Circuit ostensibly relies.

A. New Mexico Statutory and Constitutional Scheme

The Court in the Martinez decision, at p. 1394, stated: "The attorney for the Plaintiff acknowledged in his brief and at argument that the judgment there sought would be paid by state funds and handled by the risk management division of state government (§41-4-20(A)(2)). The Division uses the state public liability fund which receives appropriation from the legislature and insures some risks."

This was an unfortunate stipulation on the part of the plaintiff in Martinez, because the statement is incorrect. The public liability fund is not funded by legislative appropriations, but is funded by assessments to local public bodies. N.M.S.A. 1978, §§41-4-23(B)(8) and 41-4-25. Even if the fund is exhausted, there is no further state appropriation. The fund merely remains exhausted until

next year's assessments are collected. N.M.S.A. 1978, §41-4-25(A) and (B)(3).

Petitioner in the instant case made no such stipulation. Indeed, Petitioner has steadfastly rejected the notion that state funds could in any circumstance be used to pay this judgment entered in the District Court. A more important question arises, however. May proceeds from the public liability fund or from any source involved in the New Mexico Tort Claims Act be used to pay judgments against local school boards rendered in Federal District Court? Judge McKay in his dissent in the instant case states that New Mexico statutes do not permit the payment of judgments from state funds. See Statement of the Case.

Article VIII, §7, N.M. Const. further assures that state funds may not be used to pay civil rights judgments. This provision states that "no execution shall

issue upon" judgments against school districts or boards of education or any officer of the school district or board of education in their official capacity "but the same shall be paid out of the proceeds of a tax levy" from within the local school district and when collected "shall be paid by the county treasurer to the judgment creditor." The Court of Appeals has ruled that this constitutional provision is not self-executing and that until there is a statute executing this provision, the Constitution need not be followed. It did not address the fact that this provision also provides an express prohibition against execution upon any judgment rendered against a school district. See State v. Fiorino, 67 N.M. 366, 355 P.2d 497(1960). This prohibition cannot be ignored either by the legislature, by state administrators

or by the Federal Courts. The New Mexico Constitution dictates that no state funds may ever under any circumstance be used to pay school district judgments, whether or not the tax levy provision has been executed.

B. Role of the Financing Concerns

While the state statutory scheme for the payment of judgments against local school districts obtained in federal courts may be complicated, it is clear that the state Constitution prohibits execution on any judgment against a school board, leaving the state treasury intact. Despite the Court of Appeals being fully appraised of the incorrect stipulation of counsel in the Martinez case, it still clings to its original decision. While Petitioner maintains that there is no chance that a judgment can ever be paid out of state funds, the conclusion to be drawn from the Court of Appeals' holding

in the instant case is that the Court believes that there is a possibility that a portion of a judgment might be paid out of state funds, and this by itself is enough to grant Eleventh Amendment immunities to public bodies.

This brings us to the issue of the weight to be given the various factors in determining whether Eleventh Amendment immunities apply to public bodies.

The New Mexico local school districts are in substance the same as the Kansas school districts analyzed in Mt. Healthy and the Wyoming districts which were the subject of Stoddard v. School District No. 1, 590 F.2d 829(10th. Cir.1979). (See Statement of the Case.) In all cases, local school districts are funded by tax dollars derived from the pockets of the state's citizens. Even assuming that payments of judgments might be made from the public liability fund of the

Tort Claims Act, it should not matter that the state collects the tax and distributes funds to the districts according to a formula, as opposed to the various school districts individually raising its own funds. Under both sets of circumstances, the state's treasury is not exposed to paying any §1983 judgments against the local school districts. Also, this in no way affects the autonomy of the school district, as the collection of taxes and the subsequent application of a formula is purely mechanical and ministerial in nature. Certainly, if the state treasury were to directly pay judgments, the "autonomy" factor would fade. However, where the state treasury is immune from direct attack and will be indirectly involved only as a possibility, the "autonomy" factor should move to the forefront and the true nature of the

entity examined. If the Court of Appeals' test were the true one, the autonomy of an entity would have no importance and virtually all local public bodies would have to be considered arms of the state. To quote Judge McKay at page of his Dissent:

> Thus, if a body receives any state money, there is a possibility that state money will be used to pay a judgment. This possibility should not determine eleventh amendment immunity. The source of funds is a result of who collects the taxes -- not who is running the school board. By focusing on financing, the courts have distorted the analysis and ignored or overridden what should, in my view, be the crucial consideration -- who is making the decisions which affect constitutional rights.

In summary, Petitioner submits that the local board waived the Eleventh Amendment immunity defense. In the alternative, the Eleventh Amendment should not be applied to local school boards because a) the New Mexico Constitution

prohibits the payment of school board judgments from any source other than local tax levies, and even absent the Constitution, any impact on the state treasury is highly questionable; and, (b) even assuming that funds formally belonging to the state treasury might be applied toward payment of a judgment, this factor should not cause the judiciary to ignore the true autonomous nature of the public body.

Petitioner also points out that at last count the Tenth Circuit Court of Appeals was evenly divided on whether to grant a rehearing en banc. This indicates that one-half of the active members of the Court at least feel that the decision bears further scrutiny. Inconsistencies in the Tenth Circuit Court of Appeals opinions in this area already exist. See Dissent, page 84-6, Appendix A. Unless these issues are

resolved by this Supreme Court, the law in the Tenth Circuit will continue to vacillate.

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CERTIFICATE OF FILING

I, Ronald J. Van Amberg do affirm and state that on the 21st day of April, 1986 I placed with Federal Express forty copies of the Petition for Writ of Certiorari addressed to the clerk of the Supreme Court of the United States.

Ronald J. Van Amberg

The foregoing was acknowledged before me on this 21 day of April, 1986.

Notary Public

CERTIFICATE OF SERVICE

I, Ronald J. Van Amberg, do certify that on the 21st day of April, 1986, I mailed a copy of the Petition for Writ of Certiorari to opposing counsel:

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Ronald J. Van Amberg

APPENDIX -- A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

J. PLACIDIO GARCIA,

Plaintiff-Appellee, Cross-Appellant,

Nos. 82-1174
82-1185
82-1238

v.

BOARD OF EDUCATION OF THE SOCORRO CONSOLIDATED SCHOOL DISTRICT, LEO LUJAN, MARGENE HARRIS, DANIEL TRUJILLO and DAVID SHORTESS,

Defendants/Counter-claimants/Appellants, Cross-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
(D. C. No. 80-399 HB)

Kenneth J. Ferguson (Bruce Hall and Jo Saxton Brayer with him on the brief) of Rodey, Dickason, Sloan, Akin & Robb, Albuquerque, New Mexico, for Defendants/Counter-claimants/Appellants, Cross-Appellees.

J. Douglas Compton, of Bovis, Kyle and Burch, Atlanta, Georgia, for individual defendants as counterclaimants/Appellants, Cross-Appellees.

Ronald J. Van Amberg (Charles S. Solomon and Carl Bryant Rogers with him on the brief) of Roth, VanAmberg & Gross, Santa Fe, New Mexico, for Plaintiff-Appellee/Cross-Appellant.

Before HOLLOWAY, Chief Judge, SETH and MCKAY, Circuit Judges.

PER CURIAM

Plaintiff, Superintendent of the Socorro Consolidated School District of New Mexico, brought a section 1983 action alleging violation of his first amendment rights and claiming that he was deprived of liberty and property without due process. His claims arose out of the school board's decision not to renew his contract.

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The pertinent part of section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United Sates or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S. C. 1983 (1982).

Plaintiff named the Board of Education and the members who voted against renewing his contract as defendants. The members were named in both their individual and official capacities. During trial, plaintiff dropped the claims against the board members in their individual capacities.

Initially, the board gave no public reasons for its decision not to renew the plaintiff's contract. Upon learning about the nonrenewal, plaintiff made statements to various persons that his contract was not being renewed because he had refused to let the board coerce him into performing an illegal act. After these statements were republished in the local newspapers, the board held a special meeting to draft a statement discussing the reasons

for nonrenewal of plaintiff's contract. The reasons -- which included conduct detrimental to staff morale, that plaintiff was hard to work with, and that constituents were unhappy -- were announced publicly and reprinted in local newspapers. Based on the dismissal and the statement drafted by the board, plaintiff filed this action alledging denial of first amendment, property, and liberty rights. The board members counterclaimed for defamation.

The trial judge instructed the jury on plaintiff's liberty claim, but refused to instruct on either the first amendment or property claims. As to the counterclaim, the court instructed the jury that, in order to recover on their defamation claim, the school board members, as public

offcials, must prove that plaintiff's statements were made with "actual malice." The jury awarded plaintiff $180,000 and defendants nothing.

On appeal, plaintiff challenges the trial court's refusal to instruct the jury on the first amendment and property claims. The school board members argue that the trial court erred in failing to direct a verdict on plaintiff's liberty claim, and they challenge the trial court's

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At different points in the trial, the judge referred to the school board members as public officials and public figures. The United States Constitution, however, does not make a distinction between the two, and neither party alleges error on this ground.
See infra note 4.

finding that they were bound by the actual malice standard of proof. They also argue, for the first time on appeal, that they are immune from suit under the eleventh amendment.

I. ELEVENTH AMENDMENT

Initially, the issues raised on appeal and addressed in the parties' briefs were limited to the trial court's handling of the first amendment, due process, and defamation claims. Shortly after the briefs were filed, the school board members submitted a letter to this court asserting that the school district and board members in their official capacities enjoy eleventh amendment immunity. The eleventh amendment claim was addressed at oral argument

although not yet fully briefed. Three subissues are important: (1) whether the issue was timely raised; (2) whether the board members are estopped from raising the issue; and (3) if the issue is properly before the court and estoppel does not apply, whether the school board is in fact entitled to immunity.

A. Was the Eleventh Amendment Defense Timely Raised?

The board members raised the eleventh amendment as a defense in their Answer, First and Second Amended Answers, and in the Pre-Trial Order. Apparently, however, they did not pursue the defense, and the trial judge failed to rule on it. An

eleventh amendment defense is jurisdictional and may be raised for the first time on appeal. Edelman v. Jordan, 415 U.S. 651, 677-78 (1974) (citing Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 466-67 (1945)). Further, it may be argued on appeal even if it was raised but abandoned at the trial level. See Sosna v. Iowa, 419 U.S. 393, 396 n.2 (1975). The plaintiff argues that Patsy v. Board of Regents, 457 U.S. 496 (1982), retreated from the broad holdings of Edelman and Ford Motor. However, since Patsy, the Supreme Court has reaffirmed that an eleventh amendment defense may be raised at any time in the proceedings. Pennhurst State School & Hospital v. Halderman, 104 S. Ct. 900, 907 n.8 (1984). We sympathize with the trial court and the plaintiff when they

have been "sand bagged" as they were on this issue. However, the cases dictate this post-trial revision of the issues.

B. Are the Defendants Estopped from Raising the Defense?

The plaintiff further asserts that the school board should be estopped from raising the eleventh amendment defense. The action was initially against the board members in both their individual and official capacities. During trial plaintiff dropped his claims against the board members in their individual capacities. Three exchanges between the court and the attorneys are important. In the first exchange, the court addressed the plaintiff's attorney and asked him whether

plaintiff wanted a jury instruction for punitive damages. The judge suggested that explaining and distinguishing between the claims against defendants in their individual and official capactities would confuse the jury. In essence, the court recommended that plaintiff drop one of the claims, preferably the claim against defedants in their individual capacities. Although present, the school board's attorney did not participate in this exchange. Record, vol. 3, at 171-73. On the next day of trial, the court again addressed plaintiff's attorney, inquiring whether any decision had been made about dropping one of the claims. Plaintiff's attorney, noting that he had conferred with his client and co-counsel, informed the court that plaintiff wanted to drop the

claim against defendants in their individual capacities. The defense attorney's only participation in this exchange was to state that he and the defendants' insurer had no problem with this decision. Record, vol. 4, at 4-5. Then, in chambers, when the trial judge and attorneys for both plaintiff and defendants discussed the final version of the jury instructions, the following conversation took place:

> THE COURT: [T]he instructions are drafted as against the Defendants strictly in their official capacities. I understood that's the way the Plaintiff wanted it. Therefore, that takes out any issue of punitive damages and also any issue of good faith. So if there's no hooker -- There's no problem; if the Plaintiff is entitled to a verdict, its recoverable. I assume that's true.

[Defense Counsel]: That's true, Your Honor.

. . .

THE COURT: I mean if the Plaintiff were recovering, then all at once the school district will not respond or claim some kind of immunity or something.

[Defense Counsel]: No. They probably would not have the money, but there's no problem with that.

[Plaintiff's Counsel]: Of course, if there's nothing with the County, the Constitution provides for that.

Record, vol. 5, at 42-43.

Thus, it appears that, had the school board's attorney indicated that an eleventh amendment defense would be further pursued, the trial court might have reconsidered its recommendation that plaintiff drop his claim against the defendants in their individual capacities.

Further, when the court gave the parties the opportunity to preserve the record by making objections defendants did not object to the court's failure to rule on the defense.

However, the parties fail to address the issue of whether the school board's attorney has the authority to waive sovereign immunity. Sovereign immunity in New Mexico is now a statutory creation. In Hicks v. State, 88 N.M. 588, 544 P.2d 1153 (1975), the New Mexico Supreme Court abolished common law sovereign immunity. In response, the legislature enacted the Tort Claims Act, reinstating governmental immunity except in eight classes of activity. N.M. Stat. Ann. 41-4-4 to -12 (1978). None of the eight exceptions apply to this case. Under section 41-4-4, waiver of immunity is limited to and governed by

N.M. Stat. Ann. 41-4-13 to -25 (1978). These sections do not authorize the school board's attorney to waive sovereign immunity. Thus we find that the school board is not estopped from raising eleventh amendment immunity at this time.

C. Do the Local School Board Members in Their Official Capacity Enjoy the State's Sovereign Immunity under the Eleventh Amendment?

A nonconsenting state is immune from suit brought in federal court by her own citizens as well as by citizens of another state. See Edelman v. Jordan, 415 U.S. 651 (1974). Further, a suit in a federal court against the members of a state board or agency acting in their official capacities is a suit agains the board or agency itself, and it subject to the eleventh amendment immunity restriction. However,

since Monell v. Department of Socia Services, 436 U.S. 658 (1978) created constitutional dichotomy between state an local functions, it has been necessary i suits against agencies to determine whethe the agency sued is the alter ego of th state. If the agency is the alter ego, i enjoys the eleventh amendment immunity o the state. If it is "local" as defined b the cases, it does not enjoy the elevent amendment immunity. Thus, determination o that issue is a matter of federal law an is made by examining the relationshi between the state and the entity bein sued.

This court has recently considere whether local school boards in New Mexic are to be considered state or loca entities for eleventh amendment purposes,

and has concluded that they should be considered arms of the state. Martinez v. Board of Education of the Taos Municipal School District, 748 F.2d 1393 (10th Cir. 1984); Maestas v. Board of Education of the Mora Independent School District, 749 F.2d (10th Cir. 1984). We are bound by these decisions. The eleventh amendment therefore bars this suit against the school board and its members in their official capacities.

II. DEFAMATION (Cross Appeal)

On cross-appeal, the defendant school board members in their individual capacities complain that the trial court erroneously instructed the jury on their defamation claim.

The trial court instructed the jury that, in order to recover on their defamation claim, the school board members, as public officials, must prove that Mr. Garcia's statement was made with "actual malice" as mandated by New York Times v. Sullivan, 376 U.S. 254 (1964). The school board members challenge the instruction, arguing that they need only prove common law negligence because they are not public officials and that, even if

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3 In New York Times, the Supreme Court held that the constitutional guarantees of the first and fourteenth amendments require a "federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80.

they are public officials, the New York Times standard applies only to "media" defendants.

The Supreme Court has enunciated tests for determining whether someone is a public offical or figure. In Rosenblatt v. Baer, 383 U.S. 75, 85 (1966), the Court held that the "'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." In Gertz v. Robert Welch, Inc.,

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In Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), the Court extended the New York Times rule to public figures. See also Gertz v. Robert Welch, Inc., 418 U.S. 323, 342-43 (1974).

418 U.S. 323, 351 (1974), the Court stated that public figures are those who "assume special prominence in the resolution of public questions." The Court noted that one could become a public figure in one of two ways: (1) by achieving such personal fame and notoriety that he becomes a public figures for all purposes; or (2) by voluntarily becoming involved or being drawn into a public controversy and thereby becoming a public figure as to the issues involved in that controversy. Id. at 351.

The school board members make a variety of arguments as to why they do not fall within these definitions: They are not "employees" because they do not get paid and are elected; their position is not one that the public perceives as having

substantial responsibility over the conduct of government affairs; their power is merely local; and the public would not scrutinize their activities absent the controversy at issue in this case. The school board's arguments, however, are not persuasive. Courts have often considered elected city officials to be within the definition of public officials. See, e.g., New York Times, 376 U.S. at 283 n.23 (city commissioner); Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 299 (1971) (city mayor); Fadell v. Minneapolis Star & Tribune Co., 557 F.2d 107, 108 (7th Cir.), cert. denied, 434 U.S. 966 (1977) (elected township tax assessor); Dostert v. Washington Post Co., 531 F. Supp. 165, 166 n.1 (D.W.Va. 1982) (elected judge). As the

Supreme Court noted in Gertz, "A individual who decides to seek governmenta office must accept certain necessar consequences of that involvement in publi affairs." 418 U.S. at 344.

Further, we reject the board members argument that they are not public official because the public would not scrutiniz their decisions absent the instan controversy and because the public does no perceive them as having substantia responsibility over the conduct o government affairs. Clearly, th governance of a public school system is o the utmost importance to a community, an school board policies are often carefull scrutinized by residents. Members of the

local school board, who are elected to make decisions regarding local education, clearly "have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." Rosenblatt, 383 U.S. at 85. The strong public interest in ensuring open discussion of their job performance warrants the conclusion that school board members are public officials.

The scope of the constitutional protection established in New York Times is a more troublesome issue. Although in New York Times itself the Supreme Court specifically required a public official defamation plaintiff to prove that both the "media" and private individual defendants

made defamatory statements with actual malice, the board members argue that Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), cut back on New York Times by limiting the constitutional protection only to "media" defendants.

In analyzing New York Times and its progeny, the crux of the issue before us is whether there is any compelling reason why a private "nonmedia" defendant should be afforded less protection than a "media" defendant when discussing matters of public importance involving a public official. In other words, should a public official who sues for defamation find it easier to obtain a judgement against a "nonmedia" critic of his official conduct than he

would against a "media" critic?

In New York Times, the Court made repeated statements extoling the purposes of the first amendment, using the terms "freedom of expression," "freedoms of speech and press," "freedom of speech," and "freedom of the press." While the Court at times discussed freedom of the press and freedom of speech separately, it did not appear to make any distinction between the two in terms of the amount of protection to which they are entitled. Nor did the specific holding of the case limit the privilege to the media: "We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics

of their official conduct." New York Times, 376 U.S. at 283. The Court's reasoning focused on protecting open public debate critical of official conduct, not on the identity of the criticizing speaker.

Subsequently, in Garrison v. Louisiana, 379 U.S. 64 (1964) (criminal defamation action), and Henry V. Collins, 380 U.S. 356 (1965), the Court applied the actual malice standard to public official defamation plaintiffs suing nonmedia defendants without specifically considering whether the character of the disseminator of the information was significant. Instead, the Court again focused on the character of the defamation plaintiff as a public official. In Garrison, the Court termed the New York Times rule the "public-official rule,"

protecting "the paramount public interest in a free flow of information to the people concerning public officials, their servants." 379 U.S. at 77. "[W]here the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth." Id. at 72-73.

Then, in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the Court considered the case of a private plaintiff suing a media defendant. The Court's holding can be summarized as follows: (1) "Public officials" and "public figures" may recover for defamation only on a New York Times malice showing, id. at 343; (2) the states

may define appropriate standards of liability respecting private plaintiffs "so long as they do not impose liability without fault," id. at 347; and (3) no plaintiff may recover presumed or punitive damages, "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." Defamation plaintiffs who do not prove knowlefge of falsity or reckless disregard for the truth are limited to "compensation for actual injury." Id. at 349.

The majority in Gertz repeatedly employed terms such as "newspaper or broadcaster," "press and broadcast media," "publisher or broadcaster," and "media," and the Court phrased its holding in terms of publishers and broadcasters. Id. at

347. Further, the actual injury segment of the holding spoke of "publishers and broadcasters." Id. at 350. The Court's language and apparent focus on freedom of the press generated considerable speculation as to whether Gertz's requirements concerning fault and actual damages were limited to defamation by "media" defendants, and whether the Supreme Court might apply the Gertz rationale, focusing on freedom of the press, to cases involving public-official plaintiffs and nonmedia defendants.

The Supreme Court recently had the opportunity to decide whether the New York Times rule should be limited to media defendants in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939

(1985). While Justice Powell, writing for the Court, did not reach the issue, five members of the Court expressly rejected a distinction between media and nonmedial defendants. Justice Brennan, in a dissent joined by Justices Marshall, Blackmun and Stevens, explained:

> Such a distinction is irreconcilable with the fundamental First Amendment principle that "[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."

105 S. Ct. at 2957 (quoting First National Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978)). Similarly, Justice White stated:

I agree with Justice Brennan that the First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech. None of our cases affords such a distinction; to the contrary, the Court has rejected it at every turn.

105 S. Ct. 2953 (White, J., concurring in judgment).

Such a rejection of the defendants' suggested distinction accords with the principles underlying the New York Times

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5 Justice Burger, at least implicity, also rejected the media/nonmedia distinction, since he stated that he "agree[s] generally with Justice White's observations concerning New York Times v. Sullivan." 105 S. Ct. at 2948 (Burger, C.J., concurring in judgment).

rule and the first amendment. Criticism of the functioning and integrity of local government is exactly the type of speech the first amendment was intended to protect. "Criticism of the government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized." Rosenblatt, 383 U.S. at 85. First amendment protection should not depend on whether the criticism is in the form of speech by a private individual or publication by the institutional press. Indeed, the law should encourage the private individual to become involved in and express his or her views on the conduct

of government affairs. Arguably, vigorous debate at the local level is vastly more important in shaping an individual's ideas and opinions as to proper government conduct than is what that individual reads or hears from the national media. The bulk of government is conducted on the level where matters of public concern are decided by personal, individual exchanges. See Watkins & Schwartz, Gertz and the Common Law: Of Fault, Nonmedia Defendants, and Conditional Privileges, 15 Tex. Tech. L. Rev. 823, 849-50 (1984). Furthermore, at this absolutely central level of government, the education and aculturation of new members of society is carried on at a scale where there is no assurance at all that any media will cover, report, or

otherwise carry on the open and vigorous debate essential to a free society. Only an urban oligarch could be oblivious to the real dynamics of democracy carried on in "local" school board meetings, often too dull or localized to attract those who profit financially from selling "news." To withhold the protections of the first amendment from nonmedia participants in the political process would be to stand the amendment on its head without the slightest justification.

The focus of the analysis, in determining whether actual malice is required, must be on the subject of the speech, not on the identity of the speaker. The rationale of New York Times was two-fold:

(1) a commitment to "the principle that debate on public issues should be uninhibited, robust, and wide-open"; and (2) that such debate "may well include vehement, caustic, and sometimes unpleasntly sharp attacks on government and public public officials." New York Times, 376 U.S. at 270; Rosenblatt, 383 U.S. at 85. The traditional reasons for requiring proof of actual malice when the speech is critical of public officials -- the need for open debate regarding official actions, a public official's presumed access to the press for rebuttal, and the official's presumed consent to criticism by accepting the position -- are applicable regardless of whether the speaker is a private individual or the institutional press. Indeed, it would be irrational to require

the private individual, whose cirticism reaches a smaller audience and therefore has less potential for harm, to meet a higher standard than the press, with its vast resources and audience.

Further, we would be creating definitional monsters by attempting to define "press" and "media." Does media refer merely to institutional national newspapers, magazines, and television; or does it include the lone tax protester running off copies of his handwritten newsletter on his home photocopier? Changing technology alone would deter attempts to fashion a legal distinction between "media" and "non- media." As Justice Brennan noted, any distinction "would likely be born an anachronism." Dun & Bradstreet, Inc., 105 S. Ct. at 2958 & n.7 (Brennan, J., dissenting).

The crucial elements which brought the United States Supreme Court into the field of defamation law are present here. To create sanctions against a private person criticizing local government officials' conduct of governmental affairs would threaten the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ." New York Times, 376 U.S. at 270. There is "a strong interest in debate onpublic issues . . . and . . . a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues." Rosenblatt, 383 U.S. at 85. These constitutional values, the difficulty of defining "media," and the undesirability of carving out a greater constitutional

protection for the medial all mandate that, at lease when a public-official plaintiff is suing a non- medial defendant for defamation, the New York Times actual malice standard should applyy. Therefore, the trial court correctly instructed the jury that the defendants could recover on their counterclaims only if they could show that the plaintiff acted with actual malice.

We reverse the judgment in favor of the plaintiff and remand it for dismissal on the grounds of eleventh amendment immunity. Because the trial court correctly instructed the jury regarding the counterclaim, we affirm the verdict against the counter-claimants.

No. 82-1174 - J. PLACIDO GARCIA v. BOARD OF THE SOCORRO CONSOLIDATED SCHOOL DISTRICT, et al.

McKAY, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority's holding that the standard of proof in a defamation suit by public official does not vary depending on whether the defendant is a member of the media. I also agree that the defendants' eleventh amendment defense can be raised for the first time on appeal. I cannot agree, however, that the defendants in this case -- a local school board and its members -- are protected from suit under the eleventh amendment. Accordingly, I must dissent.

The issue on which I cannot concur is

whether the school board of Socorro Consoliidated School District is an arm of the state protected from suit by the eleventh amendment, or a local entity subject to suit. The majority finds that the school board is an arm of the state, relying on what I consider to be an ambiguous statutory provision regarding how a judgment against the board would be funded. In doing so, the majority ignores the realities of the situation. A local school board is universally viewed as a local entity. Its members are locally elected or appointed, and those local members makes decisions about the governance of the local schools. An ambiguous state funding device designed to pay all local tort and civil rights obligations cannot and should not

alter the board's fundamentally local status.

This case demonstrates clearly the mischief caused by forcing the courts to make a istinction between "state" and "local" entities for eleventh amendment purposes and, more importantly, by making that analysis turn on the source of the funds to pay the judgment. This mischief began when the Supreme Court decided, in Monell v. Department of Social Services, 436 U.S. 658 (1977), that municipalities and "local government units" are subject to suit under 1983. The Court noted that its holding was, "of course, limited to local government units which are not considered part of the state for Eleventh Amendment purposes." 436 U.S. at 690 n.54.

Since Monell, the courts have struggled to determine which local government units are more like a municipality and which are more like an arm of the state. The result has been inconsistency and confusion.

The leading Supreme Court decision on the issue of whether a school board is an arm of the state is Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). There, the Court found that the petitioner, an Ohio school district, did not enjoy the state's eleventh amendment immunity. The Court balanced the following factors: (1) statutory definitions -- "[u]nder Ohio law the 'state' does not include 'political subdivision,' and 'political subdivisions'

do include local school district"; (2) the number of local boards -- there were "many" within the state; (3) the degree of supervision and control by the state over local boards the school board was subject to "some guidance from the State Board of Education"; (4) the amount of state financial assistance the local board received "a significant amount of money from the state"; and (5) the power of the local boards to issue bonds and levy taxes school boards in Ohio could do both. Id. at 280-81. Thus, Mt. Healthy established an objective standard. As a result, the substantive form of operation, not the state's characterization of the entity, governs the immunity decision.

In applying the Mt. Healthy standards,

this court has relied primarily on a two-part balancing test to distinquish state alter egos from local units of government. In employing that test, we first must determine the extent to which the board, although carrying out a state mission, functions with substantial autonomy from the state government. In other words, we must ask: Who carries out the day-to-day

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I

In another context and long before the creation of the Monell state/local function dichotomy, the New Mexico Supreme Court declared that local school boards are arms of the State of New Mexico and enjoy eleventh amendment immunity. McWhorter v. Board of Educ., 63 N.M. 421, 320 P.2d 1025 (1958). However, since the ultimate characterization is based on the substance of the relationship as determined by the Mt. Healthy Epperson test and is a matter of federal law, the state's legal conclusion is not controlling.

independently of the state treasury. Id. at 1121-22. The primary focus in the second part of the test is on the source of the money that would be used to pay a judgment against the board. If the money for the judgment against the board would be paid out of the state treasury, the board is immune. Edelman v. Jordan, 415 U.S. 651, 663 (1974); Epperson, 583 F2d at 1122.

The last part of the test -- whether the judgment will be paid from state or local funds -- has become the key to the analysis and, in the process, has created the problems which I find in the two related cases which govern the majority's opinion. Martinez v. Board of Education of the Taos Municipal School District, 748 F. 2d 1393 (10th Cir. 1984); Maestas v. Board of

Education of the Mora Independent School District, 749 F.2d 591 (10th Cir. 1984). The absurd result of this focus on funding has been to find school districts in some states to be local entities while finding others, similarly situated and possessing similar powers, to be arms of the state. Compare Epperson, 583 F.2d at 1122 (Kansas school district is local because judgment would be paid "from monies raised by special levy within the school district itself") and Stoddard V. School District No.1, 590 F.2d 829, 835 (10th Cir. 1979) (Wyoming school district is "more like a city or county than it is like an arm of the state") with Harris v. Tooele County School District, 471 F.2d 218, 220 (10th Cir. 1973) (Utah school district is state entity because "the possibility exists that

a money judgment rendered in federal court . . . might be paid at least partially out of state funds").

In each of these cases, the state had chosen to operate the schools through a system of local school boards. There was no significant difference in the powers granted to those school boards, or the control which they exercised over their own affairs. For example, both the Kansas and Utal school boards were empowered to "sue and be sued, and to take hold, lease, sell, and convey real and personal property." Epperson, 583 F.2d at 1122-23; Harris, 471 F.2d at 222 (Holloway, J., dissenting). Indeed, as the dissent in Harris pointed out, school districts in Utah had the power, as did those in Kansas and Wyoming,

to levy special taxes to pay their judgments and to purchase liability insurance. The only real difference between the school districts was that Utah school districts were not required to levy taxes to pay their liabilities, so the judgment might have to be paid by the state. See Epperson, 583 F.2d at 1123 (distinguishing Harris on this ground). It is absolutely ridiculous, in my view, to treat school boards, otherwise similarly situated, differently because of such a possibility. If a state chooses to operate its schools through local school districts, subject to local control, it should be bound by the eleventh amendment consequences of that choice.

The absurdity caused by the focus on

funding is epitomized by this case. While article twelve, section six, of the New Mexico Constitution provides that the State Board of Education has ultimate control of the school system in New Mexico, that constitutional provision leaves in the Legislature the power to provide the details of the operation of the school system. Thus we must look to the implementing statues in order to determine whether the forum of management and control is at the local or state level. The New Mexico statutory scheme shows a clear intent to maintain local control over the schools. Powers and responsibilities allocated to the numerous local school boards by the Legislature are as follows:

> A. subject to the regulations of the state board, supervise and

control all public schools within the school district, and all property belonging to or in the possession of the school district;

B. employ a superintendent of schools for the school district and fix his salary;

C. delegate administrative and supervisory functions of the local school board to the superintendent of schools;

D. subject to the provisions of law, approve or disapprove the employment or discharge of all employees and certified school personnel of the school district upon a recommendation of employment or discharge by the superintendent of school;

E. fix the salaries of all employees and certified school personnel of the school district;

F. contract, lease, purchase and sell for the school district;

G. acquire and dispose of property;

H. have capacity to sue and be sued;

I. acquire real estate by eminent domain as in the case of railroads;

J. issue general obligation bonds of the school district;

K. repair and maintain all property belonging to the school district;

L. for good cause and upon order of the district court, subpeona witnesses and documents in connection with a hearing concerning any powers or duties of the local school board;

M. except for expenditures for salaries, contract for the expenditure of money according to the provisions of Sections 6-5-1 through 6-5-11.1 [N.M. Stat. Ann. (1953))];

N. adopt regulations pertaining to the administration of all powers or duties of the local school board;

O. accept or reject any charitable gift, grant, devise or bequest accepted shall be considered an asset of the school district or the public school to which it is given; and

P. to offer, and upon compliance with the conditions of such offer, to pay rewards for information leading to the arrest and conviction or other appropriate disciplinary disposition by the courts or juvenile authorities of offenders in case of theft, defacement or destruction of local school district property. All such rewards shall be

> paid from school district funds in accordance with regulations which shall be promulgated by the chief of the public school finance division [director of public school finance].

N.M. Stat. Ann. 22-5-4 (1978).

When viewed in context, the functions allocated to the local school board are obviously those of day-to-day management and control. They are the kinds of activities which would normally give rise to liability either in civil matters or pursuant to federal civil rights statutes. By way of contrast, the duties of the state board, which if sued would be immune, are the typical broad policy functions of state-wide boards and do not involve day-to-day management or operation. Among the state board's duties are (1) determining policy for the

operation of all public schools in the state; (2) designating courses of instruction to be taught in public schools; (3) determining teacher qualifications; (4) prescribing graduation requirements; and (5) taking over school districts where the local governing bodies fail to abide by state law in operating the schools. N.M. Stat. Ann. 22-2-2 (1978). In addition, New Mexico law provides that the Public School Finance Division has substantial control over the preparation of school districts' annual budgets. N.M. Stat. Ann. 22-8-4.

It is significant that the statutory allocation of function itself contemplates local operation by providing that the

state shall provide management only when the local governing body has failed to abide by state law in operating the schools. N.M. Stat. Ann. 22-2-2(V) (1978). Thus I believe that, in context, the form selected for the operation of schools in the State of New Mexico is local, with broad general state supervision and policy-making, rather than state-retained operative responsibility. The New Mexico school system thus is like the one which the Supreme Court found to be local in Mt. Healthy, 429 U.S. at 280 (board subject to "some guidance" from State Board of Education), and the Kansas school board which this court found to be local in Epperson, 583 F.2d at 1123 (local board subject to "general supervision" of state board). While the state has general

oversight powers, this should not obscure the fact that the statutory scheme allows the day-to-day decisions -- those likely to give rise to federal civil rights claims -- to be made at the local level. In reality, the board functions as a local entity and should be treated as such.

However, Martinez, 748 F.2d at 1395-96, and Maestas, 749 F. 2d at 591, focused on the source of the money used to pay judgments against local New Mexico school boards. Consequently, the majority in this case finds the local board to be an alter ego of the state. I cannot agree.

It is undisputed that most of the money for New Mexico public schools comes from state appropriations rather than local

funds. This receipt of state funding does not, however, alter the fact that decisions are made at the local level, and that dunding alone should not convert the local body into an arm of the state. Indeed, the Supreme Court has recognized that "a significant amount" of state funding does not make a school board a

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2 In 1974, the New Mexico legislature adopted an equalizing "formula" for funding public schools. The purpose of the formula is to equalize educational opportunities throughout the state. The total budget for a district is determined by a formula (found at N.M. Stat. Ann. 22-8-18 to -24 (1978)) which considers factors such as attendance, the number of teachers, and types of programs offered. The state then provides the funds needed to meet the budget in the amount the budget exceeds the district's local and federal revenues. The state funding, or state "guarantee," comes from the "Public School Fund" created by N.M. Stat. Ann. 22-8-14 (1978).

state entity. Mt. Healthy, 429 U.S. at 280. Moreover, if receipt of state financing were the key to eleventh admendment immunity, virtually all local entities would have to be considered arms of the state (including municipalities, which the Supreme Court has held not to be protected by the eleventh amendment). Monell, 436 U.S. at 690 n.546. All local bodies are, at least in part, state funded. Indeed, most receive federal funding as well. When a "local" body is part state-financed and part locally financed, it is often impossible to isolate the source of the funds which it will use to pay a judgment. Most of these bodies do not segregate their budget according to the source of the funds. Thus, if a body receives any state money, there is a possibility that state money

will be used to pay a judgment. This possibility should not determine eleventh amendment immunity. The source of funds is a result of who collects the taxes -- not of who is running the school board. By focusing on financing, the courts have distorted the analysis and ignored or overridden what should, in my view, be the crucial consideration -- who is making the decisions which affect constitutional rights.

The present case makes clear the difficulty of trying to isolate the source of funds, for my reading of the statutes convinces me that the New Mexico legislature has not expressly provided a method for paying federal civil rights judgments. The two cases relied on by the

majority, construing N.M. Stat. Ann. 41-4-20 (1978), find that the judgment will be paid either out of the budgeted reserves required by the New Mexico Tort Claims Act or out of the New Mexico Public Liability Funds created by that Act. Martinez, 748 F.2d at 1396; Maestas, 749 F.2d at 592. However, the provision which they rely covers only "risk [s] for which immunity has been waived under the provisions of the Tort Claims Act." N.M. Stat. Ann. 41-4-20(A) (1978). The tort Claims Act appears to waive immunity only for suits brought in the district courts of New Mexico. Id. 41-4-18(A).

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3 N.M. Stat. Ann. 41-4-18(A) (1978) provides: "Exclusive original jurisdiction for any claim under the Tort Claims Act [N.M. Stat. Ann. 41-4-1 to -27 (1978)] shall be in the district courts of New Mexico. Appeals may be taken as provided by law."

Thus, the risk coverage provisions of sections 41-4-20 through 41-4-27 would not apply to a federal court judgment such as would issue in this case. In addition, since the state has not waived state sovereign immunity from constitutional claims against public employees such as school board members, the risk coverage provisions would not apply to a judgment

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The New Mexico Tort Claims Act waives sovereign immunity only from liability for damages "resulting from bodily injury, wrongful death or property damage" caused by negligence of public employees engaged in eight categories of activities. N.M. Stat. Ann. 41-4-4 to -12 (1978). Sovereign immunity from claims for "personal injury . . . resulting from . . deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States" is waived only if the injury was caused by law enforcement officers acting within the scope fo their duties. N.M. Stat. Ann. 41-4-12 (1978).

in this case even if they were construed to cover federal court judgments. Contrary to the assumption implicit in the majority's position, therefore, a judgment probably would not be paid out of this state fund.

The plaintiff argues that the money for a judgment would come from a local tax levy and that the school board should therefore be considered a local entity. The New Mexico Constitution provides for tax levies for satisfaction of money judgments against school districts and school boards, stating:

> No execution shall issue upon judgment rendered against . . . any . . school district or board of education; or against any officer of any . . . school

> district or board of education, upon any judgment recovered against him in his official capacity and for which the . . . school district or board of education, is liable, but the same shall be paid out of the proceeds of a tax levy as other liabilities of . . . school districts or boards of education, and when so collected shall be paid by the county treasurer to the judgment creditor.

N.M. Const. art. VIII, 7 (amended Nov. 3, 1914).

However, the constitutional section is not self-executing. McAtee v. Gutierrez, 48 N.M. 100, ____, 146, P.2d 315, 318 (1944). While this constitutional authroity has been implemented by statute, the statutory provision sweeps less broadly than does the constitutional one. Section 7-37-7(C) (3) authorizes the school to assess

constitutional claims are not technically tort claims, the Supreme Court has recently made clear that constitutional claims are analogous to actions sounding in tort. Wilson v. Garcia, 105 S. Ct. 1938, 1947-48 (1985) (holding that section 1983 actions are best analogized to "tort action [s] for recovery of damages for personal injuries" for statute of limitations purposes). Thus one could

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5 relies on the fact that the Tort Claims Act requires a school board to budget for civil rights judgments. Martinez, 748 F.2d at 1396. However, as discussed above, the Tort Claims Act only mandates that the school district budget for specified torts and civil rights judgments; it does not cover civil rights claims brought in federal court. The existence of that Act, therefore, does not support the propsotion that 7-37-7(C)(3) does not authorize local tax levies to pay constitutional claims.

those rates or impositions necessaryfor the use of a governmental unit to pay a tort or workmen's compensation judgment for which a county, municipality or school district is liable, subject to the limitations in Sub-section B of Section 41-4-25 [N.M. Stat. Ann. (1978)], but no rate or imposition shall be authorized to pay any judgment other than one arising from a tort or workmen's compensation claim.

N.M. Stat. Ann. 7-37-7(C) (3) (1978) (emphasis added). The opinion relied on by the majority finds this provision inapplicable because "suits for violations of federal constitutional rights are not tort actions." Martinez, 748 F.2d at 1396. While it is true that

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5 In finding that section 7-37-7(C) (3) does not authorize tax levies for constitutional claims, the majority also

argue, as does the plaintiff, that this section, which authorizes tax levies to pay tort claims, includes the authority to levy taxes to pay for analogous constitutional judgments.

The problem, however, is that the New Mexico Legislature has clearly distinguished between constitutional claims and torts in other contexts. For

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In addition, the majority's argument would prove too much. The logical corollary of their argument would be that because the Tort Claims Act requires school districts to budget for tort judgments, section 7-37-7(C) (3) thus does not authorize levies to pay tort judgments. This conclusion would clearly be erroneous, since the statute expressly grants such authority.

example, in the Tort Claims Act, the Legislature provided that the state will defend a public employee against a claim for any tort or any violation of property rights or any rights,privileges, or immunities secured by the Constitution of the United States. N.M. Stat. Ann. 41-4-4(B) (1978) (emphasis added). Similarly, section 41-4-12 waives immunity for specific torts and for the violation of constitutional rights when committed by law enforcement officers. Relying on these provisions, the New Mexico Supreme Court has stated that the New Mexico Legislature recognizes that "a tort is separate and distinct from a constitutional deprivation." Wells V. County of Valencia, 98 N.M. 3, _____, 644 P.2d 517, 520 (1982). There is thus a

strong indication that, when the New Mexico Legislature authorized tax levies to pay "tort" judgments, it did not intend the word "tort" to encompass what it viewed as separate and distinct constitutional deprivations.

Since neither the risk coverage provisions of the Tort Claims Act nor the tax levy statute authorize payment of a federal court judgment on a constitutional claim, there is no clear statutory indication of how such a judgment would be paid. In the absence of specific authority, I can only assume that it would be paid from the general funds of the school district and, if the district lacks funds, from the general funds of the state. Thus, I concede that there is a

"possibility," Harris, 471 F.2d at 220, that a federal court judgment will be paid out of funds derived from the state. However, I cannot agree that the fortuity of the source of funds -- a question which the New Mexico Legislature does not appear to have considered -- should determine eleventh amendment immunity. Indeed, the uncertainty of the source of payment in this case highlights the absurdity of having the eleventh amendment immunity of a "local" entity turn on the source of the funds to pay a judgment.

If we are going to distinguish between local bodies and the state for eleventh amendment purposes, we must make the distinction on a principled and rational basis. The analysis should focus, not on

financing (which most local bodies will derive from numerous sources) but rather on the degree to which the local entity acts independently of the state. This approach, applying an aspect of the Mt. Healthy and Epperson tests, provides an analytically sound basis for finding a local body to be an arm of the state and protected by the state's immunity. If the state is controlling the local body to the extent that it is making the decisions which affect the constitutional rights of its citizens, then the state's immunity should shield the local entity from suit. If, however, the state chooses to allow the body to function independently and to make the decisons that affect the constitutional rights of others, then the local body should be liable for its

decisions. The state should not be able to immunize local decisionmaking through funding devices such as public liability funds designed to pay the tort and civil rights liabilities of all state and local bodies. If the state wants to immunize the local governmental bodies, it must maintain control -- not merely general supervision -- over their actions.

Because I believe that New Mexico school boards act independently of the state in the day-to-day management of the school district, with only general supervision by the state, I would find that the school board is not immune from suit under the eleventh amendment.

II. PLAINTIFF'S SECTION 1983 CLAIM

Having determined that the local school

board is subject to suit under the state/local dichotomy spelled out in Monell, I would reach the question whether the plaintiff's claim encompasses an interest protected by section 1983 and the due process clause of the fourteenth amendment.

A. Free Speech

Plaintiff briefly asserts on appeal that the trial court erred in not submitting to the jury the question whether defendants deprived plaintiff of his first amendment right to free speech. The record is so devoid of substantial evidence supporting this claim that it is not necessary to discuss the details of that evidence. It is sufficient to note that plaintiff failed to sustain his burden to show that his interest in free

speech was substantial factor in the board's decision. See Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 284-87 (1977).

B. Property Interest

In this case, plaintiff's contract of employment terminated in June of 1980. Thus, the suit challenges only the board's refusal to renew that contract once it had expired. No evidence or argument substantially supports the claim that plaintiff had any contractual or other right to the renewal of his contract. At most he had a hope or expectation of renewal. This hope or expectation did not convert his claim into a property interest. Board of Regents v. Roth, 408 U.S. 564 (1972); Perry V. Sindermann, 408

U.S. 593 (1972); Bishop v. Wood, 426 U.S. 341 (1976).

C. Liberty Interest

The trial court submitted plaintiff's liberty interest claim to the jury, and it was on that basis that the verdict in favor of plaintiff was rendered. On appeal, defendants argue that the court erred in failing to direct a verdict on this claim.

This court has noted that "[t]he concept of liberty recognizes two particular interest of a public employee: 1) the protection of his good name, reputation, honor and integrity, and 2) his freedom to take advantage of other opportunities." Weathers v. West Yuma

County School District R-J-I, 530 F.2d 1334, 1338 (10th Cir. 1976) (quoting Lipp v. Board of Education, 470 F.2d 802 (7th Circ. 1972)). See also Board of Regents v. Roth, 408 U.S. 564, 573-74 (1972). Thus, when the termination of a public employee is accompanied by public dissemination of the reasons for dismissal, and those reasons would stigmatize the employee's reputation or foreclose future employment opportunities, due process requires that the employee be provided a hearing at which he may test the validity of the profered grounds for dismissal. Miller v. City of Mission, Kansas, 705 F.2d 368, 373 (10th Cir. 1983); McGhee v. Draper, 639 F2d 639, 642-43 (10th Cir. 1981). The Supreme

Court has made clear that, "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

The very reason the Constituion requires procedural due process is that the dynamic of a fair hearing often alters a decisionmaker's determination. Even if

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6 Indeed, we have held that it is not, as a matter of law, impossible to prove that, had a due process hearing been conducted, the result of the hearing would in fact have been different. McGhee, 639 F.2d at 646.

a hearing would not have affected the decision, once the government elects to publish its reasons, bringing to bear its immense power to legitimize the truth of those statements, due process requires that if afford the accused person an opportunity to bring to bear all the legitimate forces which influence that administrative decision. See Miller, 705 F.2d at 371-72 (citing Mathews v. Eldridge, 424 U.S. 319, 333 (1976)); Owen v. City of Independence, Missouri, 560 F.2d 925, 935-37 (8th Cir. 1977). By doing so, procedural due process ensures some measure of accountability for the exercise of government power.

This does not mean that the school board must be correct in its reasons for refusing to renew the plaintiff's contract. See Bishop v. Wood, 426 U.S.

341, 349 (1976); see also McGhee, 639 F.2d at 643. Rather, due process requires only that, where the government has made public, stigmatizing statements, it must grant at least aminimal hearing at which the employee has a fair opportunity to rebut the stigmatizing charges. Once that process is observed, then the requirements of due process are satisfied, and we cannot second-guess the government's fact determination. See Bishop, 426 U.S. at 349-50.

In the present case, although the board had not constitutional duty to give reasons for its refusal to renew the contract of this nontenured employee, it

elected to do so. The board prepared and read at a public meeting the following statement setting forth its reasons for nonrenewal:

> We feel that the statements that have appeared in the news media that Mr. Garcia has done anything illegal or has been under any coercion on the part of the Board in an attempt to get him to do anything illegal are completely false.
>
> We feel that Mr. Garcia is a superior fiscal agent and has served this district in a superior manner as fiscal agent.

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7 In the year in which the nonrenewal decision was made, the plaintiff and the board were involved in a dispute. Plaintiff charged that the board declined renewal because of his refusal to do something he considered to be illegal, but which he alledged the board requested him to do anyway.

However, Mr. Garcia's contract was not renewed because:

1. Constituents have continually expressed dissatisfaction with Mr. Garcia.

2. The conduct of the Superintendent has been detrimental to staff morale.

3. Mr. Garcia has become continuously more and more unresponsive over the years and it has become more difficult to work with him.

Record, vol. 6, Exhibit 18-B. These reasons were later published in the newspaper. The plaintiff alleges that, because of these charges, he has been unable to obtain employment comparable to his former position.

The defendants argue that this statement does not, as matter of law, implicate plaintiff's liberty interest because it is not sufficiently

stigmatizing to damage his reputation or foreclose job opportunities. This court, and those in other circuits, has been

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A review of the case law illustrates the difficulty in determining what charges are stigmatizing. Some charges, such as those involving dishonesty or immorality, are clearly stigmatizing. One circuit has held that only such charges -- those involving "moral turpitude" -- can implicate a liberty interest. Bollow v. Federal Reserve Bank, 650 F.2d 1093, 1101 (9th Cir. 1981), cert. denied, 455 U.S. 948 (1982). Among the circuits which have acknowledged that other types of charges can create a serious stigma and foreclose job opportunities, the decisions have been inconsistent. Compare Huntley v. Community School Bd., 543 F.2d 979 (2d Cir. 1976), cert. denied, 430 U.S. 929 (1977) (charges of poor and ineffective leadership are stigmatizing) and Greenhill v. Bailey, 519 F.2d 5 (8th Cir. 1975) (charge that plaintiff was dismissed because of lack of intellectual ability is stigmatizing) withBlair v. Board of Regents, 496 F.2d 322 (6th Cir. 1974) (dismissal for failure to meet minimum standards not stigmatizing); Adams v.

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struggling to define what types of charges are sufficiently stigmatizing to invoke due process. For example, in Staton v. Mayes, 552 F.2d 908 (10th Cir.), cert. denied, 434 U.S. 907 (1977), we found that allegations of willful neglect and incompetence implicated a liberty interest. But in Abeyta v. Town of Taos, 499 F.2d 323, 327 (10th Cir. 1974), we characterized comparable allegations as charges of improper job performance, and found them not to stigmatize reputation as would charges of immorality or dishonesty.

Walker, 492 F.2d 1003 (7th Cir. 1974) (charges for incompetence, neglect of duty, and malfeasance in office not stigmatizing) and Jeffries v. Turkey Run Consolidated School District, 492 F.2d 1 (7th Cir. 1974) (dismissal for highly unethical conduct not stigmatizing).

It is clear that charges of minor, correctable failures in work habits do not rise to the level of stigmatization or foreclose job opportunities. See, e.g., Weathers, 530 F.2d at 1336, 1338-40 (reasons for nonrenewal were that the teacher swore at a student, had assigned too much busy work, had not looked at student's assignment, and gave all members of a group the same grade). However, where the charges go to the fundamental capacity of the employee to perform his or her job, a significant issue exists, and a court must submit it to the jury. See McGhee v. Draper, 564 F2d 902, 909-10 Cir. 1977) (reversing directed verdict on issue of whether accusations were stigmatizing). A comparison of the relative burden of a minimal due process

hearing and the very substantial damage which can be imposed on an employee by unjustified stigmatization leads to the conclusion that the threshold case should be resolved in favor of requiring due process protection.

In reviewing the denial of a directed verdit, "the evidence and inferences from it must be viewed in 'the light most favorable to the parties for whom the jury found.'" Miller v. City of Mission, Kansas, 705 F.2d 368, 373 (10th Cir. 1983) (quoting Ford Motor Credit Co. v. Milburn, 615 F.2d 892, 894 (10th Circ. 1980)). While this case is not clear cut, I cannot say as matter of law that the trial court erred in submitting the issue to the jury. The charges are such that they raise doubt about the fundamental capacity

of this superintendent to be a superintendent. Indeed, the charges at issue in this case, which include claims that plaintiff had caused low staff morale and that he was difficult to work with, are similar to those found to implicate a liberty interest in Miller. 705 F.2d at 373 (liberty interest is implicated by charges that assistant police chief had created low department morale, was not respected by the officers, and had caused deterioration of the epartment to the extent that the officers felt they could not work with him). When coupled with proof, as in the present case, from which a jury could conclude that employment opportunities were in fact precluded by the charges, the evidence was sufficient

to raise a substantial issue of whether plaintiff had been deprived of a liberty interest. See McGhee v. Draper, 564 F.2d 902 (10th Cir. 1977). The trial court therefore acted properly in submitting this claim to the jury.

In summary, I would find the school board not to be immune from suit under the eleventh amendment and would affirm the trial court's actions on plaintiff's free speech, property, and liberty claims. Because the majority holds the school board to be immune from suit, I must dissent.

NOVEMBER TERM - January 23, 1986

Before Honorable William J. Holloway, Jr. Honorable Oliver Seth, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore and Honorable Stephen H. Anderson, Circuit Judges.

J. PLACIDO GARCIA,

Plaintiff-Appellee,
Cross-Appellant.

v. Nos. 82-1174
82-1185
82-1238

BOARD OF EDUCATION OF THE SOCORRO CONSOLIDATED SCHOOL DISTRICT, et al.,

Defendants/Counter-claimants/Appellants,
Cross-Appellees.

This matter comes on for consideration of appellee/cross-appellant's, J. Placido Garcia, petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Holloway and Seth to whom the case was argued and submitted. Circuit Judge McKay, also on the hearing panel,

voted to grant rehearing.

The Court having been polled on the suggestion for rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, rehearing en banc is denied. Circuit Judges McKay, Logan and Seymour voted to grant rehearing en banc.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

APPENDIX -- C

JANUARY TERM - January 28, 1986

Before Honorable William J. Holloway, Jr., Honorable Oliver Seth, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson and Honorable Deanell R. Tacha, Circuit Judges.

J. PLACIDO GARCIA,

Plaintiff-Appellee,
Cross-Appellant,

v. Nos. 82-1174
82-1185
82-1238

BOARD OF EDUCATION OF THE SCORRO CONSOLIDATED SCHOOL DISTRICT, et al.,

Defendants/Counter-Claimants/Appellants,
Cross-Appellees.

The Court, on its own motion to correct a clerical error, hereby amends its order of January 23, 1986, nunc pro tunc, to show that the Honorable Deanell R. Tacha participated in the Court's decision on rehearing en banc in the captioned cause. Judge Tacha voted to grant rehearing en banc.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

APPENDIX -- D

MARCH TERM - April 14, 1986

Before Honorable William J. Holloway, Jr., Chief Judge, Honorable Oliver Seth, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha and Honorable Bobby R. Baldock, Circuit Judges

J. PLACIDO GARCIA,

Plaintiff-Appellee,

v. No. 82-1174
82-1185
82-1238

BOARD OF EDUCATION OF THE SOCORRO CONSOLIDATED SCHOOL DISTRICT, et al,

Defendants-Appellants.

This matter comes on for consideration of appellee's motion to affirm the judgment of the district court and appellants' response thereto. The court treats appellee's motion as a petition for rehearing from the orders of January, 23 and January 28, 1986.

Upon consideration whereof, appellee's motion is denied on the ground that Senior Judge Seth participated only in that

portion of the January 23 and January 28, 1986, orders which denied the petition for rehearing by the hearing panel, while the suggestion for rehearing en banc was denied by an equally divided number of the active circuit judges at the time of the court's action, there being no majority voting to grant rehearing en banc, and therefore the petition for further rehearing is denied.

/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk

Appendix--E

United States Constitutional Provisions

Amendment XI

The Judicial power to the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

New Mexico Constitutional Provisions

Art. V. §3, N.M. Const.

[Residence of public officers.]

All district, county, precinct and municipal officers, shall be residents of the political subdivisions for which they are elected or appointed. The legislature is authorized to enact laws permitting division of counties of this

state into county commission districts. The legislature may in its discretion provide that elective county commissioners reside in their respective county commission districts. (As amended November 8, 1960.)

Art. VIII §7, N.M. Const.

[Judgments against local officials.]

No execution shall issue upon judgment rendered against the board of county commissioners of any county, or against any incorporated city, town or village, school district or board of education; or against any officer of any county, incorporated city, town or village, school district or board of education, upon any judgment recovered against him in his official capacity and for which the county, incorporated city, town or village,

school district or board of education, is liable, but the same shall be paid out of the proceeds of a tax levy as other liabilities of counties, incorporated cities, towns or villages, school districts or boards of education, and when so collected shall be paid by the county treasurer to the judgment creditor. (As amended November 3, 1914.)

New Mexico Statutes

6-6-2. Local government division; powers and duties.

The local government division of the state department of finance and administration shall have the power and duty in relation to local public bodies to:

A. require each local public body to furnish and file with the division

on or before June 1 of each year a proposed budget for the next fiscal year;

B. examine each proposed budget, and on or before July 1 of each year approve and certify to each local public body an operating budget for use pending approval of a final budget;

C. hold public hearings on proposed budgets;

D. make such corrections, revisions and amendments to proposed budgets as may be necessary to meet the requirements of law;

E. certify a final budget for each local public body to the appropriate governing body prior to the first Monday in September of each year. Such budgets when approved shall be binding upon all tax officials of the state;

F. require periodic financial reports of local public bodies. Such reports shall contain the pertinent details

regarding applications for federal money or federal grants-in-aid, or regarding federal money or federal grants-in-aid received, including but not limited to details of programs, matching funds, personnel requirements, salary provisions and program numbers as indicated in the catalog of federal domestic assistance, of the federal funds applied for and of those received;

G. upon the approval of the secretary of finance and administration, authorize the transfer of funds from one budget item to another when such transfer is requested and an emergency condition exists meriting such transfer and such transfer is not prohibited by law. In case of emergency necessitating the expenditure for item or items not provided for in the budget, upon approval of the secretary of finance and administration, the budget may be revised

to authorize such expenditures;

H. with written approval of the secretary of finance and administration and the attorney general, increase the total budget of any local public body in the event such local public body undertakes an activity, service, project or construction program which was not contemplated at the time the final budget was adopted and approved and which activity, service, project or construction program will produce sufficient revenue to cover such increase in the budget or such local public body has surplus funds on hand not necessary to meet the expenditures provided for in the budget with which to cover such increase in the budget;

I. supervise the disbursement of funds to the end that expenditures will not be made in excess of budgeted items or for items not budgeted, and

that there will not be illegal expenditures;

J. prescribe the form for all budgets, books, records and accounts for local public bodies; and

K. with the approval of the secretary of finance and administration, make rules and regulations relating to budgets, records, reports, handling and disbursement of public funds, or in any manner relating to the financial affairs of the local public bodies.

7-36-7. Property subject to valuation for property taxation purposes.

A. Except for the property listed in Subsection B of this section, all property is subject to valuation for property taxation purposes under the Property Tax Code [Articles 35 to 38 of Chapter 7 NMSA 1978] if it has a taxable

situs in the state.

B. The following property is not subject to valuation for property taxation purposes under the Property Tax Code:

(1) property exempt from property taxation under the federal or state constitution, federal law, the Property Tax Code or other laws, but this does not include property all or a part of the value of which is exempt because of the application of a veteran or head of family exemption nor does this provision excuse an owner from any obligations to report his property as required by regulation of the division adopted under Section 7-38-8.1 NMSA 1978 or to claim its exempt status under Subsection C of Section 7-38-17 NMSA 1978; and

(2) oil and gas property subject to valuation and taxation under the Oil and Gas Ad Valorem Production Tax Act [7-32-1 to 7-32-27 NMSA 1978] and the

Oil and Gas Production Equipment Ad Valorem Tax Act [7-34-1 to 7-34-20 NMSA 1978].

7-37-2. Imposition of the tax.

A tax is imposed upon all property subject to valuation for property taxation purposes under Article 36 of Chapter 7 NMSA 1978. The tax shall be imposed at the rates authorized and in the manner and for the purposes specified in this article.

7-37-6. Rate of tax cumulative; determination; governmental units' entitlement to tax.

A. The rate of the tax is cumulative and shall be determined for application against any property in a tax year by

adding all of the rates authorized by this article and set by the department of finance and administration for the use of the governmental units to which the net taxable value of the property is allocated.

B. Each governmental unit that is authorized a rate under this article is entitled to that portion of the tax collected by applying the governmental unit's rate set for the tax year to the net taxable value of property allocated to the governmental unit.

C. For the purposes of this section and Section 7-37-7 NMSA 1978, the net taxable value of all property subject to the tax is considered allocated to the state when determining or applying tax rates authorized for the use of the state.

7-37-7. Tax rates authorized; limitations.

A. The tax rates specified in Subsection B of this section are the maximum rates that may be set by the department of finance and administration for the use of the stated governmental units for the purposes stated in that subsection. The tax rates set for residential property for county or municipal general purposes shall be the same as the tax rates set for nonresidential property for those governmental units for those purposes unless different rates are required because of limitations imposed by Section 7-37-7.1 NMSA 1978. The department of finance and administration may set a rate at less than the maximum in any tax year. In addition to the rates authorized in Subsection B of this section, the department of finance and administration shall also determine and set the necessary

rates authorized in Subsection C of this section. The tax rates authorized in Subsection C of this section shall be set at the same rate for both residential and nonresidential property. Rates shall be set after the governmental units' budget-making and approval process is completed and shall be set in accordance with Section 7-38-33 NMSA 1978. Orders imposing the rates set for all units of government shall be made by the boards of county commissioners after rates are set and certified to the boards by the department of finance and administration. The department of finance and administration shall also certify the rates set for nonresidential property in governmental units to the oil and gas accounting division of the taxation and revenue department for that division's use in collecting taxes imposed under the Oil and Gas Ad Valorem Production

Tax Act [7-32-1 to 7-32-27 NMSA 1978] and the Oil and Gas Production Equipment Ad Valorem Tax Act [7-34-1 to 7-34-20 NMSA 1978].

B. The following tax rates for the indicated purposes are authorized:

(1) for the use of each county for general purposes, a rate of eight dollars eighty-five cents ($8.85) on each one thousand dollars ($1,000) of net taxable value of both residential and nonresidential property allocated to the county;

(2) for the use of each school district for general operating purposes, for the 1981 property tax year, a rate of four dollars ($4.00) for each one thousand dollars of net taxable value of nonresidential property allocated to the school district; for the 1982 property tax year, a rate of two dollars ($2.00) for each one thousand dollars

of net taxable value of nonresidential property allocated to the school district; and for the 1983 and subsequent property tax years, a rate of fifty cents ($.50) for each one thousand dollars ($1,000) of net taxable value of residential property allocated to the school district; and

(3) for the use of each municipality for general purposes, a rate of two dollars twenty-two and one-half cents ($2.225) for each one thousand dollars ($1,000) of net taxable value of both residential and nonresidential property allocated to the municipality.

C. In addition to the rates authorized in Subsection B of this section, there are also authorized:

(1) those rates or impositions authorized under provisions of law outside of the Property Tax Code [Articles 35 to 38 of Chapter 7 NMSA 1978] that are

for the use of the governmental units indicated in those provisions and are for the stated purpose of paying principal and interest on a public general obligation debt incurred under those provisions of law;

(2) those rates or impositions authorized under provisions of law outside of the Property Tax Code that are for the use of the governmental units indicated in those provisions, are for the stated purposes authorized by those provisions and have been approved by the voters of the governmental unit in the manner required by law; and

(3) those rates or impositions necessary for the use of a governmental unit to pay a tort or workmen's compensation judgment for which a county, municipality or school district is liable, subject to the limitations in Subsection B of Section 41-4-25 NMSA 1978, but no

rate or imposition shall be authorized to pay any judgment other than one arising from a tort or workmen's compensation claim.

D. The rates and impositions authorized under Subsection C of this section shall be on the net taxable value of both residential and nonresidential property allocated to the unit of government specified in the provisions of the other laws.

22-1-2. Definitions.

As used in the Public School Code:

. . .

J. "school district" means an area of land established as a political subdivision of the state for the administration of public schools and segregated geographically for taxation

and bonding purposes;

K. "local school board" means the governing body of a school district;

L. "public school" means that part of a school district which is a single attendance center where instruction is offered by a certified school instructor or a group of certified school instructors and is discernible as a building or group of buildings generally recognized as either an elementary, secondary, junior high or high school or any combination thereof;...

22-2-2. State board; duties.

Without limiting those powers granted to the state board pursuant to Section 22-2-1 NMSA 1978, the state board shall perform the following duties:

A. properly and uniformly enforce

the provisions of the Public School Code;

B. determine policy for the operation of all public schools and vocational education programs in the state;

C. appoint a superintendent of public instruction;

D. purchase and loan instructional material to students pursuant to the Instructional Material Law [22-15-1 to 22-15-14 NMSA 1978];

E. designate courses of instruction to be taught in all public schools in the state;

F. assess and evaluate those private schools which desire state accreditation;

G. determine the qualifications for and issue a certificate to any person teaching, assisting teachers, supervising an instructional program, counseling, providing special instructional services

or administering in public schools according to law and according to a system of classification adopted and published by the state board;

H. suspend or revoke a certificate held by a certified school instructor or administrator according to law for incompetency, immorality or for any other good and just cause;

I. make full and complete reports on consolidation of school districts to the legislature;

J. prescribe courses of instruction, requirements for graduation and standards for all public schools, for private schools seeking state accreditation and for the educational programs conducted in state institutions under the authority of the secretary of the health and environment department;

K. adopt regulations for the administration of all public schools

and bylaws for its own administration;

L. require periodic reports on forms prescribed by it from all public schools and attendance reports from private schools;

M. authorize adult educational programs to be conducted in schools under its jurisdiction and promulgate and publish regulations governing all such adult educational programs;

N. require all accrediting agencies for public schools in the state to act with its approval;

O. accept and receive all grants of money from the federal government or any other agency for public school purposes and disburse the money in the manner and for the purpose specified in the grant;

P. require prior approval for any educational program in a public school which is to be conducted, sponsored,

carried on or caused to be carried on by a private organization or agency;

Q. approve all rules or regulations promulgated by any association or organization attempting to regulate any public school activity and invalidate any rule or regulation in conflict with any regulation promulgated by the state board. The state board shall have no power or control over the rules or regulations or the bylaws governing the administration of the internal organization of the association or organization;

R. review decisions made by the governing board or officials of any organization or association regulating any public school activity and any decision of the state board shall be final in respect thereto;

S. accept or reject any charitable gift, grant, devise or bequest. The particular gift, grant, devise or

bequest accepted shall be considered an asset of the state;

T. establish and maintain regional centers, at its discretion, for conducting cooperative services between public schools and school districts within and among such regions and to facilitate regulation and evaluation of school programs;

U. assess and evaluate for accreditation purposes at least one-third of all public schools each year through visits by department personnel to investigate the adequacy of pupil gain in standard required subject matter, adequacy of pupil activities, functional feasibility of public school and school district organization, adequacy of staff preparation and other matters bearing upon the education of the students;

V. provide for management and other necessary personnel to operate

any public school or school district which has failed to meet requirements of law, state board standards or state board regulations; provided, that such operation of the public school or district shall not include any consolidation or reorganization without the approval of the local board of such district. Until such time as requirements of law, standards or regulations have been met and compliance is assured, the powers and duties of the local school board shall be suspended; and

W. establish and implement a plan that provides for technical assistance to local school boards through workshops and other in-service training methods; provided, however, that no plan shall require mandatory attendance by any member of a local school board.

22-5-4. Local school boards; powers; duties.

A local school board shall have the following powers or duties:

A. subject to the regulations of the state board, supervise and control all public schools within the school district and all property belonging to or in the possession of the school district;

B. employ a superintendent of schools for the school district and fix his salary;

C. delegate administrative and supervisory functions of the local school board to the superintendent of schools;

D. subject to the provisions of law, approve or disapprove the employment, termination or discharge of all employees and certified school personnel of the school district upon a recommendation of employment, termination

or discharge by the superintendent of schools. Any employment, termination or discharge without the prior recommendation of the superintendent is void;

E. fix the salaries of all employees and certified school personnel of the school district;

F. contract, lease, purchase and sell for the school district;

G. acquire and dispose of property;

H. have capacity to sue and be sued;

I. acquire property by eminent domain as pursuant to the procedures provided in the Eminent Domain Code [42A-1-1 to 42A-1-33 NMSA 1978];

J. issue general obligation bonds of the school district;

K. repair and maintain all property belonging to the school district;

L. for good cause and upon order of the district court, subpoena witnesses and documents in connection with a hearing concerning any powers or duties of the local school boards;

M. except for expenditures for salaries, contract for the expenditure of money according to the provisions of the Public Purchases Act [13-1-1 to 13-1-27 NMSA 1978];

N. adopt regulations pertaining to the administration of all powers or duties of the local school board;

O. accept or reject any charitable gift, grant, devise or bequest. The particular gift, grant, devise or bequest accepted shall be considered an asset of the school district or the public school to which it is given; and

P. to offer, and upon compliance with the conditions of such offer, to pay rewards for information leading to

the arrest and conviction or other appropriate disciplinary disposition by the courts or juvenile authorities of offenders in case of theft, defacement or destruction of local school district property. All such rewards shall be paid from school district funds in accordance with regulations which shall be promulgated by the director of the public school finance division.

22-8-4. Public school finance division; duties.

In addition to other duties provided by law, the division shall:

A. prescribe the forms for, and supervise and control the preparation of, all budgets of all public schools and school districts;

B. compile accurate information

concerning public school finance and administration; and

C. advise and consult with the state superintendent in regard to financial matters affecting public schools and school districts.

22-8-9. Budgets; minimum requirements.

A. No budget for a school district shall be approved by the division which does not provide for:

(1) a school year consisting of at least one hundred eighty teaching days; or

(2) a variable school year consisting of a minimum number of instructional hours established by the state board of education; and

(3) a pupil teacher ratio no greater than that of the prior year or

at least one full-time certified classroom teacher, or his equivalent, for each twenty-five students or major fraction thereof, in membership in the school district.

B. The state board shall, by regulation, establish the requirements for a teaching day, the standards for an instructional hour and the standards for a full-time certified classroom teacher and for the equivalent thereof.

C. The local school board shall submit a plan for the implementation of an alternate school year to the state superintendent of public instruction for his approval.

D. None of the provisions of Subsection C or Paragraph (2) of Subsection A of this section shall be construed to apply to any school district which on the effective date of this act is not operating under a variable school

year.

22-8-14. Public school fund.

A. The "public school fund" is created.

B. This fund shall be distributed to school districts in the following parts:

(1) state equalization guarantee distribution;

(2) transportation distribution; and

(3) supplemental distributions:

(a) out-of-state tuition;

(b) emergency; and

(c) program enrichment.

C. The distributions of the public school fund shall be made by the chief [director of public school finance] within limits established by law. The balance

remaining in the public school fund at the end of each fiscal year shall revert to the general fund unless otherwise provided by law.

22-8-18. Program cost calculation; local board responsibility.

A. The total program units for the purpose of computing the program cost shall be calculated by multiplying the sum of the program units itemized as Paragraphs (1) through (4) in this subsection by the instruction staff training and experience index and then adding the program units itemized as Paragraphs (5) and (6) in this subsection. The itemized program units are as follows:

(1) early childhood education;

(2) basic;

(3) special education, adjusted

by subtracting the units derived from Class D special education ADM in private, nonsectarian, nonprofit training centers:

(4) bilingual-multicultural education;

(5) size adjustment; and

(6) special education units derived from Class D special education ADM in private, nonsectarian, nonprofit training centers.

B. The total program cost calculated as prescribed in Subsection A of this section includes the cost of early childhood, special, bilingual-multicultural and vocational education and other remedial or enrichment programs. It is the responsibility of the local school board to determine its priorities in terms of the needs of the community served by that board. Funds generated under this act [22-8-1 to 22-8-42 NMSA 1978] are discretionary to local boards provided

that the special program needs as enumerated in this section are met.

22-8-19. Early childhood education program units.

The number of early childhood education program units is determined by multiplying the early childhood education ADM by the cost differential factor 1.3. No early childhood education student shall be counted for more than 0.5 early childhood education ADM.

22-8-20. Basic program units.

The number of basic program units is determined by multiplying the basic program ADM in each grade by the corresponding cost differential factor

as follows:

Grades	Cost Differential Factor
1 through 3	1.1
4 through 6	1.0
7 through 12	1.25

22-8-21. Special education program units.

A. For the purpose of the Public School Finance Act [22-8-1 to 22-8-42 NMSA 1978], special education programs for exceptional children are those approved by the department of education and classified as follows:

(1) class A programs, in which a specially trained teacher travels from class to class or school to school assisting teachers and students on a part-time basis and in which the ratio of students to teachers is prescribed by the department of education;

(2) class B programs, in which a specially trained teacher is assigned to a classroom, call a "resource room," and works with students on a regular part-time basis and in which the ratio of students to teachers is regulated by special education standards approved by the state board of education;

(3) class C programs for moderately handicapped students whose needs require a specially trained teacher working in a special classroom; the ratio of students to teachers in class C programs is regulated by special education standards approved by the state board of education; and

(4) class D programs for severely handicapped students in which a specially trained teacher is assigned full-time to a special classroom and in which the ratio of students to teachers is regulated by special education standards approved

by the state board of education; students in class D programs may be enrolled in private, nonsectarian, nonprofit educational training centers in accordance with the provisions of Section 19-10-9 NMSA 1978.

B. All students assigned to the programs for exceptional children classified in Subsection A of this section must have been so assigned as a result of diagnosis and evaluation performed in accordance with the standards of the department of education before the students can be counted in the determination of special education program units as provided in Subsection C of this section.

C. The number of special education program units is the sum of the following:

(1) for class A and class B programs as defined in Subsection A of this section, the product of the number of approved class A and class B programs

requested by the local school board and certified to the division by the department of education multiplied by the cost differential factor 20;

(2) the special education ADM in class C programs multiplied by the cost differential factor 1.9; and

(3) the special education ADM in class D programs multiplied by the cost differential factor 3.5.

22-8-22. Bilingual multicultural education program units.

The number of bilingual multicultural education program units is determined by multiplying the full-time equivalent ADM in programs implemented in accordance with the provisions of the Bilingual Multicultural Education Act [22-23-1 to 22-23-6 NMSA 1978] by the cost

differential factor 0.3.

22-8-23. Size adjustment program units.

A. An approved public school with ADM of less than 400 including early childhood education full-time equivalent ADM but excluding special education Class C and Class D ADM is eligible for additional program units. Separate schools established to provide special programs, including but not limited to early childhood education, vocational and alternative education, shall not be classified as public schools for purposes of generating size adjustment program units. The number of additional program units to which a school district is entitled under this subsection is the sum of elementary-junior high units and senior high units computed in the following

manner:

Elementary-Junior High Units

$$\frac{200\text{-ADM}}{200} \times 1.0 \times \text{ADM} = \text{Units}$$

where ADM is equal to the average daily membership of an approved elementary or junior high school including early childhood education full-time equivalent average daily membership but excluding special education Class C and Class D average daily membership;

Senior High Units

$$\frac{200\text{-ADM}}{200} \times 2.0 \times \text{ADM} = \text{Units}$$

or,

$$\frac{400\text{-ADM}}{400} \times 1.6 \times \text{ADM} = \text{Units}$$

whichever calculation for senior high units is higher;

where ADM is equal to the average daily membership of an approved senior high school excluding special education Class C and Class D average daily membership.

B. A school district with total

ADM of less than 4,000 including early childhood education full-time equivalent ADM and special education ADM is eligible for additional program units. The number of additional program units to which a district is entitled under Subsection B of this section is the number of district units computed in the following manner:

District Units

$$\frac{4000-ADM}{4000} \times 0.15 \times ADM = Units$$

where ADM is equal to the total district average daily membership including early childhood education full-time equivalent average daily membership and special education average daily membership.

C. A school district with over 10,000 ADM with a ratio of ADM to senior high schools less than 4,000:1 is eligible for additional program units based on the number of approved regular senior high schools which are not eligible for senior high units under Subsection A

experience index the following definitions and limitations shall apply:

(1) "instructional staff" means the personnel assigned to the instructional program of the school district, excluding principals, substitute teachers, instructional aides, secretaries and clerks;

(2) the number of instructional staff to be counted in calculating the instructional staff training and experience index is the actual number of full-time equivalent instructional staff on the October payroll;

(3) the number of years of experience to be used in calculating the instructional staff training and experience index is that number of years of experience allowed for salary increment purposes on the salary schedule of the school district; and

(4) the academic degree and

of this section. The number of additional program units to which an eligible school district is entitled under Subsection C of this section is the number of units computed in the following manner:

$$\frac{4000\text{-ADM}}{\text{Senior High Schools}} \times 0.50 = \text{Units}$$

where ADM is equal to the total district average daily membership including early childhood education full-time equivalent average daily membership and special education average daily membership, and where senior high schools are equal to the number of approved regular senior high schools in the district.

22-8-24. Instructional staff training and experience index; definitions; factors; calculations.

A. For the purpose of calculating the instructional staff training and

additional credit hours to be used in calculating the instructional staff training and experience index is the degree and additional semester credit hours allowed for salary increment purposes on the salary schedule of the school district.

B. The factors for each classification of academic training by years of experience are provided in the following table:

C. The instructional staff training and experience index for each school district shall be calculated in accordance with instructions issued by the chief [director]. The following calculations shall be computed:

(1) multiply the number of full-time equivalent instructional staff in each academic classification by the numerical factor in the appropriate "years of experience" column provided in the table in Subsection B of this section;

(2) add the products calculated in Paragraph (1) of this subsection; and

(3) divide the total obtained in Paragraph (2) of this subsection by the total number of full-time equivalent instructional staff.

D. In the event that the result of the calculation of the training and experience index is .95 or less, the district's factor shall be no less the .95.

22-8-25. State equalization guarantee distribution; definitions; determination of amount.

A. The state equalization guarantee distribution is that amount of money distributed to each school district to insure that the school district's operating

revenue, including its local and federal revenues as defined in this section, is at least equal to the school district's program cost.

B. "Local revenue" as used in this section means ninety-five percent of receipts to the school district derived from the following:

(1) that amount produced by a school district property tax applied at the rate of four dollars ($4.00) to each one thousand dollars ($1,000) of net taxable value of nonresidential property allocated to the school district and to the assessed value of products severed and sold in the school district as determined under the Oil and Gas Ad Valorem Production Tax Act [7-32-1 to 7-32-37 NMSA 1978] and the Oil and Gas Production Equipment Ad Valorem Tax Act [7-34-1 to 7-34-20 NMSA 1978]; and

(2) the school district's share

of motor vehicle fees distributed in accordance with Section 22-8-33 NMSA 1978.

C. "Federal revenue" as used in this section means ninety-five percent of receipts to the school district derived from the following:

(1) the school district's share of forest reserve funds distributed in accordance with Section 22-8-33 NMSA 1978;

(2) grants from the federal government as assistance to those areas affected by federal activity authorized in accordance with Sections 236 through 240 of Title 20 of the United State Code (commonly known as "PL 874 funds") or an amount equal to the revenue the district was entitled to receive if no application were made for such funds; and

(3) grants from the federal government to public secondary schools

authorized by the United States Vocational Education Act of 1963, as amended (20 U.S.C. 1241-1391).

D. To determine the amount of the state equalization guarantee distribution, the director of public school finance shall:

(1) calculate the number of program units to which each school district is entitled using membership and other required reports for the first forty days of the school year and for the first eighty days of the school year;

(2) using the higher number of the result of the calculation in Paragraph (1) of this subsection and the instructional staff training and experience index from the October report of the prior school year, establish a total program cost of the school district;

(3) calculate the local and federal revenues as defined in this

section; and

(4) deduct the sum of the calculations made in Paragraph (3) of this subsection from the program cost established in Paragraph (2) of this subsection.

E. The amount of the state equalization guarantee distribution to which a school district is entitled is the sum of the amounts in Paragraphs (1) and (2) of this subsection or the amount calculated under Paragraph (3) of this subsection, whichever is greater:

(1) the balance remaining after the deduction made in Paragraph (4) of Subsection D of this section; and

(2) five percent of the difference between the amount that would be produced by applying a rate of eight dollars ninety-two and one-half cents ($8.925) to each one thousand dollars ($1,000) of net taxable value of

nonresidential property as defined in the Property Tax Code [Articles 35 to 38 of Chapter 7 NMSA 1978] for property taxation purposes in the school district and to each one thousand dollars ($1,000) of the assessed value of products severed and sold in the school district as determined under the Oil and Gas Ad Valorem Production Tax Act and the Oil and Gas Production Equipment Ad Valorem Tax Act and the amount produced by applying a rate of four dollars ($4.00) to the same net taxable values and assessed values; or

(3) for any school district in which ninety-five percent of the amount that would be produced by applying a rate of eight dollars ninety-two and one-half cents ($8.925) to each one thousand dollars ($1,000) of net taxable value of residential and nonresidential property as defined in the Property Tax

Code for property taxation purposes in the school district and to each one thousand dollars ($1,000) of the assessed value of products severed and sold in the school district as determined under the Oil and Gas Ad Valorem Production Tax Act and the Oil and Gas Production Equipment Ad Valorem Tax Act when added to the amount determined under Paragraph (2) of Subsection B of this section, would exceed the program cost established in Paragraph (2) of Subsection D of this section, the amount of the state equalization guarantee distribution shall be an amount equal to the difference between the amount that would be produced if a rate of eight dollars ninety-two and one-half cents ($8.925) were applied to each one thousand dollars ($1,000) of net taxable value of residential and nonresidential property as defined in the Property Tax Code for property taxation

purposes in the school district and to each one thousand dollars ($1,000) of the assessed value of products severed and sold in the school district as determined under the Oil and Gas Ad Valorem Production Tax Act and the Oil and Gas Production Equipment Ad Valorem Tax Act and the sum of the amounts produced by applying a rate of four dollars ($4.00) to the net taxable values of nonresidential property and to the assessed values of the products severed and sold in the school district and a rate of fifty cents ($.50) to each one thousand dollars ($1,000) of net taxable value of residential property in the school district.

F. The state equalization guarantee distribution shall be distributed prior to June 30 of each fiscal year. The calculation shall be based on the local and federal revenues specified in this

section received from June 1 of the previous fiscal year through May 31 of the fiscal year for which the state equalization guarantee is being computed. In the event that a district has received more state equalization guarantee funds than its entitlement, a refund shall be made by the district to the state general fund.

G. Notwithstanding the methods of calculating the state equalization guarantee distribution in this section and Laws 1974, Chapter 8, Section 22, if a school district receives funds under Section 2391 of Title 42 U.S.C.A. and if the federal government takes into consideration grants authorized by Sections 236 through 240 of Title 20 of the United States Code and all other revenues available to the school district in determining the level of federal support for the school district for the

sixty-fourth and succeeding fiscal years, the state equalization guarantee distribution for school districts receiving funds under this subsection shall be computed as follows:

fiscal year program cost for the year for which the state equalization guarantee distribution is being computed

x

prior fiscal year state equalization guarantee distribu-tion

prior fiscal year

plus an amount that would be produced by applying a rate of eight dollars forty-two and one-half cents ($8.425) to each one thousand dollars ($1,000) of net taxable value of residential property as defined in the Property Tax Code for property taxation purposes in the school district plus the difference between the amount that would be produced

by applying a rate of eight dollars ninety-two and one-half cents ($8.925) to each one thousand dollars ($1,000) of net taxable value of nonresidential property as defined in the Property Tax Code for property taxation purposes in the school district and to each one thousand dollars ($1,000) of the assessed value of products severed and sold in the school district as determined under the Oil and Gas Ad Valorem Production Tax Act and the Oil and Gas Production Equipment Ad Valorem Tax Act and the amount produced by applying a rate of four dollars ($4.00) to the same net taxable values and assessed values equals the fiscal year state equalization guarantee distribution for the year for which the state equalization guarantee distribution is being computed.

If at any time, grants from the federal government as assistance to those

areas affected by federal activity authorized in accordance with Sections 236 through 240 of Title 20 of the United States Code (commonly known as "PL 874 funds") are reduced or are no longer available, then the equalization guarantee distribution shall be computed by the formula contained in this subsection plus an increase by fifty percent of the amount the prior year's PL 874 funds exceed PL 874 funds for the year for which the state equalization guarantee is being computed.

41-4-18. Jurisdiction; appeals; venue.

A. Exclusive original jurisdiction for any claim under the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978] shall be in the district courts of New Mexico. Appeals may be taken as provided by law.

B. Venue for any claim against the state or its public employees, pursuant to the Tort Claims Act, shall be in the district court of the county in which a plaintiff resides, or in which the cause of action arose, or in Santa Fe county. Venue for all other claims pursuant to the Tort Claims Act, shall be in the county in which the principal offices of the governing body of the local public body are located.

41-4-20. Coverage of risks; insurance.

A. It shall be the duty of governmental entities to cover every risk for which immunity has been waived under the provisions of the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978] or any liability imposed under Section 41-4-4 NMSA 1978 as follows:

(1) local public bodies shall cover every such risk or liability as follows:

(a) for a risk for which immunity has been waived pursuant to Sections 41-4-9, 41-4-10 and 41-4-12 NMSA 1978, the local public body shall cover the risk, and for any commercially uninsurable risk for which public liability fund coverage is made available, the local public body may insure the risk in accordance with the provisions of Section 41-4-25 NMSA 1978;

(b) for excess liability for damages arising under and subject to the substantive law of a jurisdiction other than New Mexico, including but not limited to other states, territories and possessions and the United States of America, the local public body shall provide coverage in accordance with the provisions of Subsection B of Section

41-4-27 [41-4-28] NMSA 1978, if coverage is available; and

(c) for a risk or liability not covered pursuant to Subparagraphs (a) and (b) of this paragraph, the local public body shall purchase insurance, establish reserves or provide a combination of insurance and reserves or provide insurance in any other manner authorized by law; and

(2) for state agencies, the risk management division shall insure or otherwise cover every such risk or liability in accordance with the provisions of Section 41-4-23 NMSA 1978. Coverage shall include but is not limited to coverage for all such liability arising under and subject to the substantive law of a jurisdiction other than New Mexico, including but not limited to other states, territories and possessions and the United States of America.

B. The department of finance and administration shall not approve the budget of any governmental entity that has not budgeted an adequate amount of money to insure or otherwise cover pursuant to this section or Section 3-62-2 NMSA 1978 every risk of the governmental entity for which immunity has been waived under the provisions of the Tort Claims Act or liability imposed under Section 41-4-4 NMSA 1978. The public school finance division of the department of finance and administration shall not approve the budget of any school district which has failed to budget sufficient revenues to insure or otherwise cover pursuant to this section every risk for which immunity has been waived pursuant to the provisions of the Tort Claims Act or liability imposed under Section 41-4-4 NMSA 1978.

C. No liability insurance may be

purchased by any governmental entity other than as authorized by the Tort Claims Act.

41-4-23. Public liability fund created; purposes.

A. There is created a "public liability fund." The fund and any income from the fund shall be held in trust, deposited in a segregated account and invested by the department of finance and administration with the prior approval of the state board of finance.

B. Money deposited in the public liability fund may be expended by the risk management division:

(1) to purchase tort liability insurance for state agencies and their employees and for any local public body participating in the public liability

fund and its employees from an insurance company determined to be the best responsible bidder, as defined in the Public Purchases Act [13-1-1 to 13-1-27 NMSA 1978], after:

(a) requesting sealed proposals from three or more licensed insurance agents; or

(b) requesting bids in accordance with the provisions of the Public Purchases Act;

(2) to contract with one or more consulting or claims adjusting firms pursuant to the provisions of Section 41-4-24 NMSA 1978;

(3) to defend, save harmless and indemnify any state agency or employee of a state agency or a local public body or an employee of such local public body for any claim or liability covered by a valid and current certificate of coverage to the limits of such certificate of

coverage;

(4) to pay claims and judgments against governmental entities or their employees covered by a certificate of coverage;

(5) to contract with one or more attorneys or law firms on a per-hour basis, or with the attorney general, to defend tort liability claims against governmental entities and public employees acting within the scope of their duties;

(6) to pay any costs and expenses incurred in carrying out the provisions of this section;

(7) to create a retention fund for any risk covered by a certificate of coverage; and

(8) to cover personal injury liability risks of governmental entities, including the risks set forth in Paragraph (2) of Subsection B and Paragraph (2) of Subsection D of Section 41-4-4 NMSA

1978, to the extent and to the limits of any certificate of coverage.

C. No settlement of any claim covered by the public liability fund in excess of five thousand dollars ($5,000) shall be made unless the settlement has first been approved in writing by the director of the risk management division. This subsection shall not be construed to limit the authority of an insurance carrier, covering any liability under the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978], to compromise, adjust and settle claims against governmental entities or their public employees.

D. Claims against the fund shall be made in accordance with rules or regulations of the director of the risk management division. If the director of the risk management division has reason to believe that the fund would be exhausted by payment of all claims allowed during

a particular state fiscal year, pursuant to regulations of the risk management division, the amounts paid to each claimant and other parties obtaining judgments shall be prorated, with each party receiving an amount equal to the percentage his own payment bears to the total of claims or judgments outstanding and payable from the fund. Any amounts due and unpaid as a result of such proration shall be paid in the following fiscal years.

41-4-25. Public liability fund; municipal public liability fund; local public body participation.

A. Except as provided in Subsection B of this section, local public bodies shall obtain coverage for all risks for which immunity has been waived under the Tort Claims Act [41-4-1 to 41-4-27

NMSA 1978] pursuant to Sections 41-4-9, 41-4-10 and 41-4-12 NMSA 1978, through the public liability fund by paying into the fund an assessment to be determined by the director of the risk management division which shall be based on the risks to be insured. In addition, any municipality or county upon application to the risk management division may obtain coverage for any risk for which immunity has been waived under the Tort Claims Act through the public liability fund if the director of the risk management division determines that:

(1) the risk is, in fact, commercially uninsurable or insurable only at a cost or subject to conditions which the director deems unreasonable. To make this determination, the director may require the municipality to submit such information as he deems appropriate and may also seek information from any

other source; and

(2) the municipality or county has paid all insurance premiums and public liability fund assessments in a timely manner or has had good cause for failing to do so.

The municipality or county shall pay for coverage of uninsurable risks by paying into the fund an assessment to be determined by the director which shall be based on risks to be insured. However, payment of all or part of any such assessment may be deferred or postponed without penalty until future years if the municipality or county certifies to the director's satisfaction that it has insufficient funds available to pay all or part of any assessment. The municipality or county shall be deemed to have insufficient funds only if it is, in the current fiscal year, levying the full property tax millage allotted

it under law and, in addition, has levied during the current fiscal year a five-mill levy above the constitutional twenty-mill limit to pay tort judgements. Any deferred or postponed assessment is payable in any succeeding fiscal year, subject to the same limitations on duty to pay, until paid in full.

B. A municipality having a population over one hundred thousand which has adopted a charter pursuant to Article 10, Section 6 of the constitution of New Mexico may, by ordinance of the governing body, elect to create a "municipal public liability fund" to insure or otherwise cover any risk for which immunity has been waived under the Tort Claims Act. A municipal public liability fund created pursuant to this subsection shall provide that:

(1) the fund and any income from the fund shall be held in trust, deposited in a segregated account and

invested in accordance with law;

(2) any money deposited in the fund may only be expended: to purchase liability insurance; to contract with one or more consulting or claims adjusting firms; to defend, save harmless and indemnify any employee of the municipality for any liability covered by the municipal public liability fund; to contract with one or more attorneys or law firms on a per-hour basis to defend tort liability claims against the municipality and its officers and employees acting within the scope of their duties; and to create a retention fund adequate to cover all uninsured risks of the municipality;

(3) if the municipal public liability fund will be exhausted by the payment of all judgments and claims allowed during a particular fiscal year, amounts paid to each claimant or person obtaining a judgment shall be prorated, with each

person receiving an amount equal to the percentage his own payment bears to the total of claims and judgments outstanding and payable from the fund. Any amounts due and unpaid as a result of such proration shall be paid in the following fiscal year;

(4) no tort or workmen's compensation judgment shall be paid by a tax levy upon real or personal property unless the judgment exceeds one hundred thousand dollars ($100,000). The tax levy shall be made only on that portion of the judgment which is in excess of one hundred thousand dollars ($100,000). Judgments arising out of a single occurrence shall be paid by tax levies for the portions of the judgments in excess of one hundred thousand dollars ($100,000);

(5) the governing body shall review all judgments set forth in Paragraph

(4) of this subsection prior to transmitting them to the county assessor for inclusion in the property tax assessment. The review by the governing body shall include a finding by the governing body that the judgment or judgments properly arose, under the Workmen's Compensation Act [52-1-1 to 52-1-69 NMSA 1978] or under the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978]. After so finding, the governing body shall by resolution direct the county assessor to provide an assessment as required; and

(6) the ordinance shall not become effective until the department of finance and administration has reviewed and approved the ordinance as complying with all of the provisions of this subsection.

C. The risk management division may assess any local public body with

a risk covered by the public liability fund:

(1) a penalty in a percentage or minimum amount to be fixed by the director of the risk management division, with the advice of the risk management advisory board, for the failure to make timely payment of any assessment of the division; or

(2) a surcharge not exceeding seventy-five percent of the rate established by the division for coverage under the public liability fund, if:

(a) the local public body fails to meet any of the underwriting standards or claims procedures prescribed by regulations of the division; or

(b) the local public body fails to carry out any safety program prescribed by regulations of the division.

D. If any local public body fails to insure or otherwise cover any risk,

the immunity for which has been waived under the provisions of the Tort Claims Act, any resident of the local public body shall have standing to bring suit to compel compliance with the provisions of the Tort Claims Act. Nothing in this section shall be construed to allow any recovery against any governmental entity for any damages resulting from the failure of the governmental entity to insure or otherwise cover any risk.